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In the Supreme Court of the United States

October Term, 1962

CLAUDE DENNIS, *Petitioner*

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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No.....

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CLAUDE DENNIS, *Petitioner*

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Utah, entered in the above-entitled case on May 29, 1962.

OPINIONS BELOW

The opinion below was filed in the Utah Supreme Court on May 29, 1962. A corrected opinion was later filed and dated back to the same date. The original opinion is reported in the Advance Pacific Reporter at 372 P.2d 3. The corrected opinion is not yet reported

but is attached hereto as Appendix A. The original opinion is attached hereto as Appendix B.

JURISDICTION

The judgment of the Utah Supreme Court was rendered on May 29, 1962. The petition for rehearing filed by petitioner herein was denied by the Utah Supreme Court on August 7, 1962. (Appendix C.) Jurisdiction to grant this petition is sustained by Section 1257(3), Title 28, U.S.C.A.

QUESTIONS PRESENTED FOR REVIEW

The Supreme Court of Utah set aside a jury verdict for petitioner in a case filed by a railroad employee under the Federal Employers' Liability Act. The question presented for review is whether that holding is in conflict with controlling decisions of the United States Supreme Court. It is petitioner's position that the Utah Court improperly held as a matter of law:

(a) That respondent was not negligent in overexposing petitioner to freezing weather.

(b) That petitioner's own conduct was the sole proximate cause of his injuries; and

(c) That petitioner assumed all risks incident to his employment.

The decision of the Utah Court is in conflict with *Anderson v. Atchison, T. & S.F.R. Co.* 333 U.S. 821,

68 S.Ct. 854, 92 L.Ed. 1108 (1948); *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943); *Blair v. Baltimore & O.R. Co.*, 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490 (1945); *Boston & Maine Railroad v. Mecch*, 156 F. 2d 109 (1st Cir. 1946) (Cert. Den. Oct. 28, 1946), 329 U.S. 763, 67 S.Ct. 124, 91 L.Ed. 658; *Coray v. Southern Pacific Co.*, 112 Utah 166, 185 P. 2d 963, 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208 (1949); *Davis v. Virginian R. Co.*, 361 U.S. 354, 80 S.Ct. 387, 4 L.Ed. 2d 366 (1960); *Ellis v. Union Pacific R. Co.*, 146 Neb. 397, 19 N.W. 2d 641, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572 (1947); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 77 S.Ct. 457, 1 L.Ed.2d 511 (1957); *Harris v. Pennsylvania R. Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed.2d 1 (1959); *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946); *Lillie v. Thompson*, 332 U.S. 459, 68 S.Ct. 140, 92 L.Ed. 73 (1947); *Pauly v. McCarthy*, 109 Utah 398, 166 P.2d 501, 330 U.S. 802, 67 S.Ct. 962, 91 L.Ed. 1261 (1946); *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493; *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944); *Tiller v. Atlantic Coast Line R. Co.*, 128 F.2d 420 (4th Cir. 1942), 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943); *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949); *Webb v. Illinois Central R. Co.*, 352 U.S. 77 S.Ct. 451, 1 L.Ed.2d 503 (1957); *Wilkerson v. McCarthy*, 112 Utah 300, 187 P.2d 188, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1947).

Some of the language from the above cases is par-

ticularly applicable here. In *Lavender v. Kurn*, supra, this court stated:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.
>
> "But where, as here, there is an evidentiary basis for the jury's verdict, . . . the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In *Tennant v. Peoria & P.U.R. Co.*, supra, this court stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury . . . It is the jury, not the court which is the fact-finding body . . . the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

In *Bailey v. Central Vermont R. Co.*, supra, this court stated:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In *Jamison v. Encarnacion*, 281 U.S. 635, 50 S.Ct. 440, 74 L.Ed. 1082 (1930), this court stated:

> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning."

And in *Rogers v. Missouri Pacific R. Co.*, supra, this court stated:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

This Court has recognized that a railroad's duty to exercise reasonable care extends to protection of its employees from any and all sorts of harm. See *Lillie v. Thompson*, supra, (unprotected telegraph operator criminally assaulted); *Urie v. Thompson*, supra, (exposure to silica dust); *Anderson v. Atchison, T. & S.F. R. Co.*, supra, (exposure to weather).

STATUTES INVOLVED

The Statutes of the United States here applicable are 45 U.S.C.A., Sections 51-59, commonly known as the Federal Employers' Liability Act. Sections 51, 53, and 54 are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner, a fifty-five-year-old section hand, filed this action to recover damages for injuries sustained by

him in the course of his employment on the night of January 2-3, 1960, near Green River, Utah. He claimed that respondent negligently required him to work an overtime, hastily planned shift of approximately twelve hours on a windswept night in zero temperature, without adequate warming facilities, in order to perform a routine repair of an open joint; and that as a result he suffered frostbite, necessitating amputation of two fingers on his left hand. (R. 1-3.) The evidence supported his claim.

The track maintenance crew, of which petitioner was a member, was called on Saturday evening, January 2, 1960, to repair an open joint on the mainline track approximately sixteen miles west of Green River. The crew consisted of the foreman and three laborers, one of whom was petitioner. (R. 93.) Another crew member, Delmar H. Powell, could not be located. (R. 93, 196.) A track maintenance crew worked out of Cedar, Utah, but was not called. The open joint in question was slightly in the Cedar crew's territory. (R. 92, 96.)

A joint is the convergence point of two lengths of rail. Joints are fastened together by angle bars, bolts, and nuts on each side of the rails. An open joint is caused by the contracting of rails in extremely cold weather to the point where the bolts on one side of a joint are sheared, thus causing an undesired separation. (R. 96, 99.) The rails at the open joint in question were approximately one and three fourths of an inch apart. (R. 99.)

The repair of an open joint is accomplished by loosening the nuts on the bolts at each joint, continuing from the open joint for approximately nine joints in each direction. (R. 105.)

The rails are thirty-nine feet in length. (R. 96.) This would mean that the men were working over a total distance the equivalent of two and one-third football fields.

After the nuts are loosened, a chisel is used to pry the rails at the open joint close enough together so that new bolts and nuts can be used at the place where they have been broken. (R. 105-108.) A wrench approximately four feet in length is used to loosen the nuts.

The crew met at the toolhouse near the Green River depot at approximately 5:00 p.m. The weather was "awful cold," (R. 94.) the weather report indicating a temperature of ten degrees Fahrenheit, growing colder during the night to five degrees below zero Fahrenheit at 5:00 a.m. (Ex. 3-P.) Petitioner wore heavy underwear, a levi-type of waist overalls, heavy shirt, and heavy jacket, a sheepskin coat, heavy socks, work shoes, and two pairs of gloves, inner canvas gloves with a flannel material on the inside, and outer rubberized canvas gloves. (R. 94, 154.) Petitioner was not wearing overshoes. (R. 94, 95.)

The crew was taken by truck to milepost 571, where it was met by the signal maintainer, Bud Wernz. Wernz and the crew then proceeded by motorcar a distance of approximately three fourths of a mile to where the open joint was located. The first operation performed by the crew consisted of insertion of a "dutchman," so that the track could be used by trains while the repair work was taking place. A "dutchman" is a small piece of rail which can be inserted at an open joint by removing the angle bars, inserting the "dutchman," replacing

the angle bars, and tightening the nuts and bolts on one side of the joint. With a "dutchman" thusly inserted trains can be slowed down and moved across a joint being repaired, at from fifteen to twenty miles per hour. (R. 100, 118, 147.)

Petitioner testified that a "dutchman" is a safe temporary repair, and that on the night in question, after the "dutchman" had been inserted, one man could have remained at the site and the repair work done the following morning. (R. 119, 120, 139.) There was evidence that it is practical to issue train orders so that trains coming over a "dutchman" will know where to slow down. (R. 121.) Petitioner testified that by working in daylight, the open joint could have been repaired in four hours instead of the ten and one-half hours it took on the night in question. (R. 119, 120.) He also testified that by utilizing an extra crew and working by daylight the work could have been completed in two hours. An additional crew working at night would have shortened the task to four hours. (R. 120, 121.)

As soon as the "dutchman" was inserted, the foreman sent petitioner back to the truck, which had been left near milepost 371. This necessitated walking through eight to ten inches of snow, approximately three hundred yards. (R. 101, 102.) After the truck was driven to the site, a tie was removed and used in making a fire. However, the fire was ineffective in producing much heat because of the severe wind which was blowing from the west through the cut in which the open joint was located. (R. 105.)

At first all four men worked, with one pair pro-

ceeding west and one east from the open joint, with one man holding a lamp and the other using the wrench. (R. 211-213.) Later, the four men bunched up, working on one side, with two or three men working and the foreman supervising. (R. 106-110.) The truck driver worked at intervals, moving the truck and using the truck lights for two or three hours prior to midnight. (R. 211, 212.)

Petitioner testified that he was cold and that using his hands on the cold tools also contributed to the coldness of his hands. (R. 107.) He testified that he had never worked in weather that cold prior to the night in question. (R. 92, 127, 129, 130.)

The foreman chose to have the men take regular turns at the fire as the work progressed under his supervision. Petitioner testified:

> "A. We would alternate to go to the fire unless a train was going by and then we was all over there at the same time." (R. 149.)

Three trains went by during the night. (R. 146, 147.)

The foreman was in direct and continuous supervision of the crew throughout the night. He testified as follows:

> "Q. Mr. Chronopoulos, you have been the Section Foreman in that Green River area for several years, have you?
>
> "A. I have.
>
> "Q. But as a Section Foreman, you are the person who is in charge out there, are you not?
>
> "A. I am.
>
> "Q. And you make the decisions, do you?

"A. I do.

"Q. And you tell the men what to do, when to do it and how to do it?

"A. That's right." (R. 205.)

Petitioner testified that at approximately midnight he noticed that he had to pry the fingers on his left hand from their grip on the wrench and commented about this to the foreman. (R. 109.) At that time he also noticed a tingling sensation. They continued with their work. Later in the evening the batteries on the lights grew weak, and the lights on the truck were used to help light the area. Petitioner testified that he went to the truck at the end of the shift for the purpose of turning the truck around. This took "not over thirty minutes altogether." (R. 143, 144.) The job was finished at approximately 4:00 a.m., and the crew returned in the truck to Green River, arriving at approximately 5:00 a.m., making a total working time of twelve hours. (R. 111.) A regular shift is eight hours. (R. 92.) After arriving home petitioner noticed tingling, burning, and discoloration of his left hand. He went to see the doctor that same morning and received medication. Later he was sent to Dr. Hubbard at Price and was hospitalized. It became necessary to amputate most of the little and ring fingers on his left hand. In 1938 petitioner had lost his left middle finger due to an infection. (R. 111, 114.)

Dr. Reed Clegg testified that when a person's body temperature is reduced, his extremities are more easily subject to frostbite. Therefore, a person having cold feet is more subject to frostbite of his hands. (R. 165.) The foreman, J. G. Chronopoulos, testified he noticed when the crew first met that petitioner was not wearing

overshoes and he did not think petitioner was warmly enough dressed. He did nothing about it. (R. 132, 205, 206.)

The jury returned a verdict in the gross amount of $20,000.00 and made a reduction of $10,000.00 for contributory negligence.

The Supreme Court of Utah rendered its opinion on May 29, 1962, vacating petitioner's judgment. Thereafter petitioner filed a petition for rehearing which was denied on August 7, 1962.

In the meantime, the Utah Supreme Court found it necessary to correct the original opinion by deleting several factual errors which had been called to its attention by petitioner. See Appendices A and B.

SPECIFICATION OF ERRORS

The Supreme Court of Utah set aside a jury verdict for petitioner and directed that judgment be entered for respondent. This decision inappropriately deprived petitioner of his constitutional right to a jury trial and is based on the following prejudicial and reversible errors:

1. The Supreme Court of Utah improperly held as a matter of law that respondent was not negligent in overexposing petitioner to freezing weather.

2. The Supreme Court of Utah improperly held as a matter of law that petitioner's negligence in not leaving his work and seeking protection from the cold was the sole proximate cause of his injuries.

3. The Supreme Court of Utah improperly held

as a matter of law that petitioner was himself in the best position to judge and appraise the danger of overexposure and thus improperly resurrected the doctrine of assumption of risk as a bar to petitioner's right of recovery.

ARGUMENT

POINT 1

THE SUPREME COURT OF UTAH IMPROPERLY HELD AS A MATTER OF LAW THAT RESPONDENT WAS NOT NEGLIGENT IN OVEREXPOSING PETITIONER TO FREEZING WEATHER.

In determining whether the evidence presented a jury question on the issue of negligence "we must assume the most favorable statement of plaintiff's case to be true." See Mr. Justice Holmes per *Texas & Pacific R. Co. v. Behymer*, 189 U.S. 468, 23 S.Ct. 622, 47 L.Ed. 905 (1903). And ". . . the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury." See *Ellis v. Union Pacific R. Co.*, supra.

Factual Basis for Jury Finding of Negligence

The evidence was that petitioner had been unnecessarily exposed to twelve hours of nighttime windy weather hovering near the zero mark and had been furnished only an ineffective fire made from an old tie for the purpose of keeping warm. The crew, in repairing the open joint, was required to work a distance of nine

rail lengths in each direction from the joint. A rail is thirty-nine feet in length. Under the continuous supervision of a domineering foreman (the jury saw this man and the Utah Supreme Court didn't) the members of the crew took turns seeking warmth at the fire. The fire was of such quality that only by putting one's hands directly into the fire could any warmth be obtained. (R. 149.)

In *Bailey v. Central Vermont R. Co.*, supra, this court stated:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of the guardrail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground — all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions emphasize the appropriateness of leaving the question to the jury."

And in *Boston & Main Railroad v. Mcech*, supra, the Circuit Court stated:

> "The sufficiency of the evidence to support the verdict on the second count is at least equally clear. The defendant might have painted lines on the platforms of its washstand to indicate the extent to which locomotives overhang them and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it might even have set the platforms of its washstand back from the tracks far enough to

prevent locomotives from overhanging them at all.

"From the foregoing, it is clear that although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted.' Lavender v. Kurn, et al, supra [66 S.Ct. 744.]"

See also *Strickland v. Seabord Air Line R. Co.*, Fla., 80 So.2d 914, 350 U.S. 893, 76 S.Ct. 157, 100 L.Ed. 786 (1955).

Petitioner being entitled to the benefit of favorable inferences reasonably deducible from the evidence, it may not be amiss to consider what could have been done by respondent to safeguard its employees.

1. An additional crew working at night would have provided more men to hold the lights and more men to work on the joints. This would have made possible reduction of the working time from ten and one-half hours to four hours. It would also have allowed the men to spend more time at the fire.

2. The job could have been postponed until morning by using a "dutchman" and having one man posted as a flagman. Working in the daylight there would have been no need for men to hold the lights while the other men worked, or of a man operating the truck to keep its lights shining on the work. This would have provided two additional men to work on the joints and made possible completion of the work in four hours instead of

ten and one-half hours. An additional crew would have further reduced the work time to two hours.

3. The crew could have worked a short evening shift and come back the next morning to finish the job.

4. The foreman could have taken the crew to Green River after having worked five or six hours and spent an hour warming and having coffee and then returned to finish the job.

5. If the foreman thought, as he testified, that Dennis was not warmly enough dressed, he should have sent Dennis back to Green River to obtain additional clothing, especially after Dennis advised him that he was cold.

6. In view of the fact that Dennis was not wearing overshoes, the foreman should have sent another man the three hundred yards through the snow to get the truck.

In the face of the foregoing evidentiary basis for the jury's verdict, the Utah court has held that this is one of those

> "... infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." See *Rogers v. Missouri Pacific R. Co.*, supra.

Inappropriate Resolution of Facts by Utah Supreme Court

Once again the Utah Supreme Court has deprived a plaintiff of a jury trial by the inappropriate resolution of conflicting evidence. We cite a number of specific instances.

1. In its opinion the Utah Court states:

> "However, in searching for fault on the part of the railroad, it is significant to observe that there is no evidence that any one prevented or dissuaded the plaintiff from warming his hands as often or as long as he wanted to";

And again:

> "He made similar candid admissions about being kept in the cold, admitting that he had access to the fire and to the truck to warm himself at any time he wanted to."

The Utah court fails to take into consideration the fact that *the foreman was in continuous supervision of the crew throughout the night, and the procedure adopted under his supervision was for the men to take turns at the fire.* The Utah court adopted as fact an inference that plaintiff could have taken some one else's turn at the fire in addition to his own without objection from the foreman. The correct inference in petitioner's favor is that as a common laborer, working under the direction of a foreman, and knowing that they weren't going to quit until repair of the open joint was completed, petitioner would not feel that he had the pleasant alternative of being a slacker while his fellow workmen were laboring in the cold. There is no evidence that the foreman was such a generous fellow. In addition, petitioner, as a conscientious workman, would feel it his duty to stay out and do his share of the work. That was expected of him and the thing for which he was paid.

2. The Utah court states:

> "With all sympathy for the plaintiff's misfortune, and every indulgence towards his claims,

> we are nevertheless unable to perceive any basis upon which the defendant can be held in violation of its duty to exercise reasonable care for his safety. Neither party can be blamed for the cold weather. Both were fully aware of it."

Petitioner has never undertaken to blame respondent for the cold weather. The basis for petitioner's claim, which the Utah court failed to perceive, is that respondent negligently exposed him to the cold weather for an unreasonable length of time. The repair of the open joint was not an emergency. The foreman could have delayed the work until morning. However, he chose to keep the crew at work until the repair had been completed. This brings into consideration the question of time. In view of the zero weather, the wind, and the darkness, what would be a reasonable cutoff time? Suppose this crew couldn't have finished the job in less than twenty hours. Would the Utah court hold as a matter of law that twenty hours of exposure was reasonable? Here petitioner was exposed to adverse weather conditions for twelve hours. A normal shift under ordinary conditions is eight hours. (R. 92.) Should a state appellate court decide what is a reasonable cutoff time as a matter of law, or should this matter be resolved by a jury in the spirit of liberality typified by the *Bailey* case, supra?

3. The Utah Supreme Court stated:

> "It must be appreciated that the railroad is in a business which literally moves on and must be kept moving."

And again:

> "In the face of difficulties such as here arose, it must resort to the best expedient available to

> meet these responsibilities and to keep its trains running on schedule."

Who should determine what is the "best expedient available"? As we have pointed out, the jury was not obliged to find it was necessary *or even particularly important* that "in order to keep the railroad moving," petitioner's crew work through a windswept zero temperature night for a period of twelve hours. As a matter of fact, the testimony was that by use of the "dutchman" trains could have been, as they were, kept moving without interruption, regardless of whether the repair was made that night or the next morning. This is another example of an argumentative fact-finding appraisal of the evidence rather than a determination of whether there was an "evidentiary basis" for a finding in plaintiff's favor.

4. The Utah court states:

> "They claim reasonable care required these measures: (1) That the defendant should have put more men on the job, which would have shortened the time for the repair and plaintiff's exposure to the cold; and (2) that the "dutchman" (a short section of rail) could have been placed in the break and left until morning when the repair could have been done more quickly in daylight and when it was not quite so cold.
>
> "In so far as the record reveals, these claims are fashioned of nothing more substantial than conjecture and there is no reasonable basis to hold the railroad negligent on either count."

And again:

> "Nor is it shown that additional men would have shortened the time required for the repair."

The fact is, petitioner testified that an additional crew working at night could have repaired the open joint in four hours instead of ten and one-half hours; that a single crew working in daylight could have performed the repair in four hours rather than ten and one-half hours; and that with an additional crew working in daylight, they could have completed the work in two hours. (R. 119-121.)

Petitioner's opinion was based on sixteen years' experience as a section hand. Furthermore, he is supported by the facts. The evidence was that in the early evening the four men paired off, each pair working simultaneously, step by step, away from the open joint. One man would hold the light and the other man work with the wrench. Later the crew started to work on one joint at a time. The truck driver would move the truck as the work progressed in order to help with the lighting. Also, the men were taking turns at the fire. It is obvious that an additional crew would have made it possible for the men to work throughout the night on two or more joints at a time. Additional men would have been available to hold the lights, and the men would have been able to spend more time at the fire. (R. 106-110, 211-213.) If the work had been done in the daylight, it wouldn't have been necessary for men to hold the lights; and with additional men available to work on the joints, this would have shortened the work time.

The Utah court, however, found as a fact that additional men wouldn't have shortened the work time *at all*, and that petitioner's claim to the contrary is based on "nothing more substantial than conjecture."

5. In the original opinion the Utah Supreme Court stated:

> "He said that at sometime during the night he complained of being cold, and the foreman told him to get in the truck."

And again:

> "It is undisputed that the only time he mentioned being cold the foreman suggested that he go to the truck for that purpose and he did so."

The foregoing statements were deleted from the corrected opinion after being called to the court's attention by petitioner, because petitioner had denied their truth under oath. (R. 143.) For the purpose of this petition the foreman at no time suggested that petitioner get into the truck. But it is interesting to note that when the decision was made to defeat petitioner, said misapprehension existed in the mind of the Utah court.

6. In both of its opinions, the Utah court persists with the statement that the foreman and both older men testified that petitioner "went to the truck about midnight and remained there the rest of the night until the repair was completed about 4:00 a.m."

The foregoing statement is not supported by the record. The foreman testified petitioner was in the truck two hours. (R. 201.) Lee Carbjal testified petitioner was in the truck two hours. (R. 182, 183.) James Burnett never did testify as to how long petitioner was in the truck. But the two hours supported by respondent's witnesses cannot be taken as true. Petitioner testified:

> "Q. Now, Mr. Dennis, I will ask you if this is not a fact that along about midnight you

reported to your foreman, Mr. Chronopoulos, that you were cold and that he told you if you were cold to go sit in the cab of the truck and take Mr. Burnett's place and remain in there. Did that happen?

"A. I don't remember him telling me to get in no truck.

"Q. Well, did you get in the cab of the truck that night?

"A. Right on the last end of the job.

* * *

"Right on the last of the job, the last two or three joints we finished.

"Q. (By Mr. Ashton) Isn't it a fact, Mr. Dennis, that you got into the cab of that truck along about midnight and remained in the cab of the truck until the job was completed?

"A. No.

"Q. And isn't it a fact that you remained in the cab of that truck for two or three hours while the rest of the men were out on the track completing the job?

"A. No, it isn't right.

"Q. Well, did you stay in the truck at all that night and operate the truck lights?

"A. I turned the truck around.

"Q. *How long would you say you were in the truck?*

"A. *Not over thirty minutes altogether, turning it around and altogether.*" (R. 143, 144.)

It is interesting to note that the foreman had petitioner ride in the cold back end of the truck on the sixteen-mile return trip to Green River. (R. 201, 202.)

Misconceptions of Law

In addition to its overriding misconception of the law concerning the right of trial by jury, the Utah court has made a number of erroneous statements as to the status of the law. We cite only a few.

1. In addressing itself to petitioner's evidence as to what more should have been done to protect the crew from overexposure the Utah court stated:

> "In so far as the record reveals, these claims are fashioned of nothing more substantial than conjecture and there is no reasonable basis to hold the railroad negligent on either count."

With regard to the conjecture argument this court stated in *Lavender v. Kurn*, supra:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.*" (Italics ours.)

See also on the matter of conjecture the case of *Gibson v. Elgin, Joliet & Eastern R. Co.*, 246 F. 2d 834 (7th Cir. 1957).

2. The Utah court states:

> "However extensive the railroad's duty to its employees for their safety has become, it has never extended to the supervision of the attire of its section hands."

The Utah court is incorrect in making the foregoing statement. The following cases impose the duty on railroads of exercising ordinary care in supervising the attire of employees: *Ferrara v. Boston & Maine Railroad*, 338 Mass. 323, 155 N.E. 2d 416 (1959) (failure to furnish employee with helmet while welding). *Fitzpatrick v. St. Louis-San Francisco R. Co.*, Mo., 327 S.W.2d 801 (1959) (failure to furnish goggles; loss of eye because of dust). *Spears v. Atchison, T. & S.F.R. Co.*, 255 F.2d 780 (7th Cir. 1958) (failure to furnish rubber boots to protect feet from diesel and fuel oils). *Williams v. Atlantic Coast Line R. Co.*, 190 F.2d 744 (5th Cir. 1951) (failure to furnish lifesaving equipment where working on washout). *Young v. Clinchfield R. Co.*, 288 F.2d 499 (4th Cir. 1961) (failure to furnish respirator to employee working behind cribbing machine).

3. The Utah court apparently is of the opinion that if an additional crew was not available, the railroad is absolved from responsibility. The court states:

> "Other than the reference to its attempt to try to get the one more crew member who couldn't be located, there is no evidence that more men or crews were available."

This is a novel defense against the claim of insufficient help, but it has no legal support. The following cases support findings of negligence for failure to provide sufficient help, and hold that the duty of providing sufficient help is nondelegable. *They do not impose on an injured workman the duty of proving that other workmen were standing in the wings waiting to be called into the game.* See *Blair v. Baltimore & O. R. Co.*, supra:

Bourquet v. Atchison, T. & S.F.R. Co., 65 N.M. 207, 334 P.2d 1112 (1959); *Davis v. Virginian R. Co.*, supra; *Southern Railway Co. v. Welch*, 247 F. 2d 340 (6th Cir. 1957); *St. Louis-San Francisco R. Co. v. King*, Okl., 368 P.2d 835 (1961).

In addition to being incorrect as to the law, the Utah court is incorrect as to the fact. One member of the crew was simply missing, Delmar H. Powell. He could have held the light while another man was at the fire *and thus made it possible to keep the work going on two joints at a time, had he been present.* The work was actually being done in the territory of the Cedar crew, which was being used elsewhere. (R. 92, 93, 96.)

4. Petitioner cited the *Rogers* case, supra, to the Utah court and was met with the following statement:

> "Plaintiff also urges application to our case of certain language from Rogers v. Missouri Pacific Railroad Company:
>
> "'. . . The test of a jury case is simply whether the proofs justify with reason the conclusion that the *employer negligence played any part, even the slightest*, in producing the injury . . .' (Emphasis added.)
>
> "*We do not understand the emphasized phrase upon which plaintiff places great reliance in support of his position, as referring to the question whether negligence did or did not exist.* It will be noted that the statement proceeds upon the assumption that there is negligence and refers to the quantum thereof. It says in effect that if there is negligence, which played any part in causing the plaintiff's injury, even the slightest, the defendant is responsible for whatever proportion of the damages it caused. But it does not

> suggest any the less necessity for finding negligence, nor that 'even the slightest' fault might be found to be negligence." (Italics ours.)

The Utah Court states that the liberal test pronounced in the *Rogers* case applies to the causation issue but not to the issue of negligence. A peremptory reading of the leading cases on the issue of negligence, as well as on the issue of proximate cause, demonstrates that there is no such nice distinction in quantum of proof between negligence and causation. See *Wilkerson v. McCarthy*, supra; *Lavender v. Kurn*, supra; *Tiller v. Atlantic Coast Line R. Co.*, supra; *Bailey v. Central Vermont R. Co.*, supra; *Tennant v. Peoria & P. U. R. Co.*, supra.

The *Rogers* case made no such distinction. The following language from the Rogers case indicates that the Utah court is wrong on this point as well as on so many others.

> "The Congress when adopting the law was particularly concerned that the issues *whether there was employer fault* and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence." (Italics ours.)

Erosion of the Federal Employers' Liability Act

The Utah court states:

> "The writer believes it is unfortunate that there is not a compensation act so that this plaintiff and others similarly situated could be compensated for injuries suffered in performing the duties of employment without all of the tribulations and the risks involved in a contentious litiga-

> tion to determine where fault lay, often as here, without success. But that is the responsibility of Congress."

The United States Supreme Court has also addressed itself to this subject, where it is said in the *Rogers* case:

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction."

And again:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of the right to a jury determination."

In Utah there has been an unfortunate erosion of the right to a jury trial in Federal Employers' Liability Act cases.

In *Pauly v. McCarthy*, supra (1946), plaintiff had received a verdict under the Federal Employers' Liability Act for injuries sustained when he fell while alighting from a caboose. Defendant appealed. The Utah court reversed, holding as a matter of law that

there was insufficient evidence for the jury. In a stout effort, as demonstrated by the fact the decision was thirty-three pages long, the Utah court assumed the role of the jury and held that an unlighted and unguarded walkway along the bridge on a passing track at Chacra, Colorado, was not a place to work, and that defendant had no duty to make it reasonably safe. It stated:

> "If the passing track at Chacra is a place to work, then every other passing track on the road is by the same token a place to work."

Just as in the case at bar, plaintiff had cited *Bailey v. Central Vermont R. Co.*, supra, as controlling authority. The Utah court attempted to distinguish the *Bailey* case by pointing out that the car involved in the *Bailey* case had been "spotted" on the bridge, and that the bridge was a "definite and assigned place to work." The Supreme Court of the United States reversed in a per curiam opinion, citing *Bailey v. Central Vermont Railway*, supra, and *Ellis v. Union Pacific R. Co.*, supra.

The lesson of the *Pauly* case was not well learned. The same issue was once again presented to the Utah court in *Wilkerson v. McCarthy*, supra (1947). In the *Wilkerson* case plaintiff had brought an action under the Federal Employers' Liability Act for personal injuries sustained when he fell from a board across a wheel pit. He was an engine foreman and was moving from one place in the yard to another in the performance of his duties. The Utah court argued the facts at great length, pointing out that the wheel pit was used for wheel pit employees, and that the posts and chains had been erected around the pit as a warning to *other* em-

ployees not to use the plank across the pit as a walkway. The Utah court minimized plaintiff's evidence that employees other than wheel pit employees had continued to use the plank as a walkway for a period of approximately two and a half months following installation of the chains and posts. The Utah court said that such slight evidence did not establish a custom and practice which would make a jury question of notice to the railroad company. The Utah court again attempted to distinguish the *Bailey* case and stated that the evidence was much more slight and therefore the language of the *Bailey* case was inapplicable. This court unanimously reversed and remanded the case for a new trial and pointed out that the basic error of the Utah Supreme Court was indicated by the manner in which the opinion discussed disputed questions of fact, stating:

> "Thus the conflict as to continued use of the board as a walkway after erection of the chains was whether the pit workers alone continued to use it as a walkway, or whether employees generally so used it. While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict.
>
> "*It was only as a result of its inappropriate resolution of this conflicting evidence that the State Supreme Court affirmed the action of the trial court in directing the verdict.*" (Italics ours.)

The strange claim of the Utah Supreme Court that the *Rogers* case requires one quantum of proof for negligence and another for proximate cause is reminiscent of another experience the Utah court had with the United States Supreme Court in the case of *Coray v. Southern Pacific Co.*, supra (1949), where the Utah court affirmed the trial court in granting a motion for

nonsuit in a Federal Employers' Liability Act death case. Certiorari was granted by the United States Supreme Court and the case reversed. In the *Coray* case the Utah court considered the stopping of the train to be a cause "in a philosophical sense" but not a cause "in a legal sense." The Supreme Court of the United States discussed niceties of language to defeat the right of trial by jury:

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose."

See also the case of *Siciliano v. Denver and Rio Grande Western R. Co.*, 12 Utah 2d 183, 364 P. 2d 413 (Aug. 24, 1961), where the Supreme Court of Utah again ruled as a matter of law that a jury question was not made out by the evidence. This case was settled before it could be reviewed by the United States Supreme Court. It stands as an unfortunate and incorrect legal precedent in Utah. See the dissent of Mr. Justice Crockett. Compare the case of *Birmingham Southern R. Co. v. Ball*, Ala., 126 So.2d 206 (Jan. 12, 1961), where an opposite result obtained from a similar fact situation.

POINT II

THE SUPREME COURT OF UTAH IMPROPERLY HELD AS A MATTER OF LAW THAT PETITIONER'S NEGLIGENCE IN NOT LEAVING HIS WORK AND SEEKING PROTECTION FROM THE COLD WAS

THE SOLE PROXIMATE CAUSE OF HIS INJURIES.

The Federal Employers' Liability Act expressly eliminates contributory negligence as a bar to recovery (U.S.C.A., Title 45, Sec. 53), but allows diminution of the verdict. The jury, under proper instructions, found petitioner negligent and reduced the verdict by $10,000.00. The Supreme Court agreed that petitioner was negligent and went on to say:

> "... it seems quite inescapable that it was the plaintiff's own conduct ... that resulted in this regrettable injury."

Thus the Utah court defeated petitioner by resort to the simple expediency of calling contributory negligence, in effect, "sole proximate cause."

This court denounced such subterfuge in *Grand Trunk Western R. Co. v. Lindsay*, 233 U.S. 42, 34 S.Ct. 581, 58 L.Ed. 838 (1914), in the following language:

> "... and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his acts contributory negligence."

See also to the same effect *Tiller v. Atlantic Coast Line R. Co.*, supra; *Illinois Central R. Co. v. Skaggs*, 240 U.S. 66, 36 S.Ct. 249, 60 L.Ed. 528 (1916); *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 38 S.Ct. 318, 62 L.Ed. 751 (1918); *Spokane & Inland Empire R. Co. v. Campbell*, 241 U.S. 497, 36 S.Ct. 683, 60 L.Ed. 1125 (1916).

In determining as a matter of law that petitioner's conduct was the sole proximate cause of his injuries, the court entirely overlooked certain significant facts.

The foreman and petitioner were together in nighttime, windy, zero weather for twelve hours. They were in a precisely equal position to observe conditions and to appreciate the danger from overexposure. The Utah court imposed sole responsibility on petitioner for not observing these conditions, leaving the work to his fellow crew members, defying the authority of the foreman, and seeking out a comfortable and safe refuge. At the same time the Utah court held as a matter of law that the foreman in charge had no responsibility of observing conditions or taking measures for the safety of his men. No consideration was given to the question of reasonable foreseeability of harm from the adverse working conditions, or the fact that the foreman had absolute and unquestioned authority over his men and responsibility for their safety. By his own testimony the foreman had noticed petitioner was not warmly enough dressed. (R. 196.) Yet he continued to let him work through the night in weather that was the coldest petitioner ever remembered working in at night (R. 92.), and even selected petitioner to go through the snow three hundred yards to get the truck when he knew petitioner was the only man who wasn't wearing overshoes. (R. 196.)

It is difficult to follow the judicial contortion indulged by the Utah court. This is not even the type of "close or doubtful" case mentioned in the *Bailey* case, supra. Rather it would seem to be the type of case that would more readily lend itself to the procedure adopted

by this court in *Strickland v. Seabord Air Line R. Co.*, supra, where certiorari was granted and the judgment of the Florida court (80 So.2d 914) reversed and the verdict reinstated without the necessity of further briefs, arguments, or proceedings.

POINT III

THE SUPREME COURT OF UTAH IMPROPERLY HELD AS A MATTER OF LAW THAT PETITIONER WAS HIMSELF IN THE BEST POSITION TO JUDGE AND APPRAISE THE DANGER OF OVEREXPOSURE AND THUS IMPROPERLY RESURRECTED THE DOCTRINE OF ASSUMPTION OF RISK AS A BAR TO PETITIONER'S RIGHT OF RECOVERY.

In 1939 Congress amended the Federal Employers' Liability Act by eliminating assumption of risk as a defense. See 53 Stat. 1404, C. 685, 45 U.S.C.A., Sec. 54. See Appendix D. The leading case interpreting the aforesaid amendment is *Tiller v. Atlantic Coast Line R. Co.*, 128 F.2d 420, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610. The lower court in dismissing plaintiff's case had said:

> "The conclusion is inescapable that Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business, and that in circumstances other than those provided for in the amended section of the statute, the doctrine of the assumption of the risk must be given its accustomed weight."

The United States Supreme Court rejected this position and stated:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

And again:

> "The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon."

The Utah Supreme Court did not follow the *Tiller* case when it decided the *Pauly* case, supra. In that case we find the following language:

> "It is to be hoped that in industry generally this differentiation between a workman having assumed the risks of his employer's negligence by continuing in the employment after he has notice of the danger, and the assumption of risks inherent in the industry difficult or impossible to eliminate, will be noted by the courts and given its former one time place in the law."

But the hope expressed in the *Pauly* case was repudiated when this court reversed the *Pauly* case in the per curiam opinion to which we have heretofore referred.

Now we find camouflaged in platitudinous language another attempt to resurrect the doctrine of assumed risk in a Federal Employers' Liability Act case. The opinion of the Utah court contains the following language:

> "Neither party can be blamed for the cold weather. Both were fully aware of it. . . The plaintiff himself was in the best position to know how to dress himself for his work . . . plaintiff alone could know how cold he was; that he could best judge what to do about it and communicate the fact to others . . . it seems quite inescapable that it was the plaintiff's own conduct with respect to his clothing and/or in caring for his own person in the cold, that resulted in this regrettable injury."

Said language indicates that the Utah court has again fallen into the error warned against by Mr. Justice Holmes where he states in *Schlemmer v. Buffalo R. & P. R. Co.*, 205 U.S. 1, 27 S.Ct. 407, 51 L.Ed. 681 (1907):

> ". . . unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

In *Gulf, Colorado & S.F.R. Co. v. Waterhouse*, Tex. Civ. App., 223 S.W. 2d 654 (1949), the appellate court sustained a finding that a foreman was negligent in ordering plaintiff to work after plaintiff complained to him of the effects of heat. Defendant had argued that the foreman was not negligent, *because plaintiff was himself the best judge of his own strength, and that it could be assumed that plaintiff would avoid becoming overheated.* The court stated at page 661:

> "... but they bring to mind applications of the defense of assumed risk and suggest further that plaintiff's return to work and his performing work amounted to negligence on his own part and that this negligence was the sole cause of his injury. The Federal Employers' Liability Act applies to this case, as plaintiff has pointed out, and thus the defense of assumed risk, including the extensions of this defense referred to in Tiller v. Atlantic Coast Line R. Co., is not available to defendant."

Of particular application to this issue is the language of *Williams v. Atlantic Coast Line R. Co.*, supra, where the court stated:

> "Indeed, even though the employee may know that the employer has been negligent in the furnishing of a safe place to work or necessary safety equipment, the employee does not under this act assume the risks of such danger."

Respondent's foreman admitted that he felt petitioner was insufficiently clothed, yet he continued to supervise the work and to thus expose petitioner to a *known* danger. This fact alone would be sufficient to support petitioner's verdict.

CONCLUSION

The Utah court has denied petitioner the right of trial by jury with the statement:

> "Practically any type of industrial accident could in some way have been prevented by the application of precautions perceivable by hindsight. If nothing else, the plaintiff could have 'stood in bed.'"

If the opinion of the Supreme Court of Utah is permitted to stand, the Federal Employers' Liability Act will not afford railroad workers in Utah the same remedy that it affords in other jurisdictions where the decisions of this court are respected and followed. It will not do to say in Utah that the decisions of this court are controlling where the interpretation and effect of the Federal Employers' Liability Act is involved, since trial courts usually follow the decisions of their immediate appellate courts. Contributory negligence is called "sole proximate cause" in Utah, and liability is denied as a matter of law.

It is respectfully submitted that the opinion of the Utah court is in conflict with the express provisions of the Federal Employers' Liability Act and controlling decisions of this court construing that Act. For the reasons herein set forth a writ of certiorari should be granted and petitioner's verdict reinstated.

Respectfully submitted,

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(APPENDICES A, B, C and D FOLLOW)

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

CLAUDE DENNIS, *Plaintiff and Respondent,* v. THE DENVER and RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Defendant and Appellant.*	No. 9543 (Corrected Opinion) FILED May 29, 1962 Clerk, Supreme Court, Utah

CROCKETT, Justice:

Defendant railroad appeals from a jury award in favor of plaintiff, an employee, who lost two fingers on his left hand as a result of frostbite while repairing track.

The case is grounded in the Federal Employers' Liability Act,[1] which allows recovery for negligence of the employer even if the employee is contributorily negligent, requiring that the total award be diminished by the proportion his negligence bears to the whole. The jury awarded $20,000 damages and deducted one-half thereof for the plaintiff's negligence, leaving a net award of $10,000.

The essence of the railroad's appeal is that the evidence fails to show that it was guilty of any negli-

1. 45 U.S.C., Sec. 51 et seq

gence, or that by any such conduct it contributed to cause plaintiff's injury.

In accordance with recognized appellate procedure, we must review the evidence in the light most favorable to the verdict.[2]

Plaintiff had worked as a section hand for the defendant for 16 years. He was part of a crew working out of Green River, Utah, where he and other members of the crew lived. On the night of January 2, 1960, the foreman, J. G. Chronopolous, called plaintiff and two other men to report for work with him at 5 p.m. He tried but was unable to locate a fifth man. The plaintiff was not dressed as warmly as the others. He was the only one without overshoes; and whereas the others wore woolen mittens, he wore two pairs of gloves: the inner pair of canvas and the outer pair of rubberized material. Plaintiff testified that he had worked at other times, including nights, while similarly dressed; and that he wore what he thought was sufficient clothing.

The assignment was to go in a truck to a point on the defendant's mainline about 18 miles west of Green River to repair what is called an "open joint" which had developed between the ends of rails because of their contraction due to extremely cold weather. The procedure is to loosen eight or nine of the 40-foot rail lengths, one at a time on either side of the open joint and move each slightly toward the open joint and thus close it. During the procedure they use what is called a "dutchman": a short piece of rail, two or three inches

2. Johnson Ready-Mix Concrete Company v. United Pacific Ins. Co., 11 Utah 2d 279, 358 P.2d 337.

in length, depending upon the necessity, to insert temporarily while trains are allowed to pass over it at reduced speed.

This particular job took nearly all night. The weather was bitter cold; there was snow on the ground and there was some wind. The recorded temperature at Green River was plus 10 degrees F. at 5 p.m. January 2, and minus 5 degrees at 5 a.m. the next morning. While the work was in progress, the men chopped up old ties and maintained a fire by which they warmed themselves intermittently. Their truck, which had a heater in it, was close by, its motor running at least part of the night, its lights being required to aid in the work. Particularly when a train would pass, the men would stay by the fire.

Plaintiff testified that he was cold; that the first indication of trouble with his hands came about midnight when he was loosening rail bolts with a large iron wrench about four feet long, he noticed his fingers seemed to be clamped to the wrench and he had to pry them loose. He said that at some time during the night he complained of being cold. He also stated that he went to the truck to get warm, but thought he was only there about 30 minutes, which in view of the verdict must be taken as true. However, in searching for fault on the part of the railroad, it is significant to observe that there is no evidence that anyone prevented or dissuaded the plaintiff from warming his hands as often or as long as he wanted to; and that the foreman and both of the other men testified that the plaintiff in fact went to the truck around midnight and remained there the rest of the night until the repair was completed about 4 a.m. At about noon the next day when plaintiff

awakened from his sleep he noticed that his fingers were painful and discolored, so he thought they must have been frozen. After reporting the matter to his foreman and being examined by the doctor, he was hospitalized and treated for frostbite. It became necessary to amputate the little finger and ring finger of his left hand; the former at the first joint from the knuckle and the latter at the knuckle. An added tribulation is that the middle finger on that hand had already been amputated some 22 years before because of an infection. Thus he now has only the thumb and index finger on that hand. The evidence is that he can still perform the duties of his employment as a section hand despite his loss of his fingers.

It will be conceded by all, including the defendant, that by the terms of the F.E.L.A. and the decisions of the U.S. Supreme Court[3] and this court[4] regarding its application, these principles are well established: that it imposes a high standard of care upon the railroad to safeguard its employees against injury; that the duty of care increases in proportion to the danger involved in the employment; that there must be a policy of extreme liberality in allowing the issues in such cases to be determined by a jury; and that if there is any evidence whatsoever to justify a reasonable belief that the railroad failed to exercise such precautions as reasonable care and prudence would dictate under the circumstances, the verdict must be sustained. But that is as far as the law goes. It is neither an insurance nor a com-

3. See Wilkerson v. McCarthy, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497; Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916; Rogers v. Missouri Pacific RR Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493.
4. See Stickel v. Union Pacific RR Co., 122 Utah 477, 251 P.2d 867.

pensation act. The right to recovery is based upon negligence.'

To justify the submission of the case to the jury and the finding of negligence, the plaintiff set forth what he calls "the more could have been done rule," stating that "this rule was well established in the case of Bailey v. Central Vermont Railway, Inc."[6] That case does not harmonize with the interpretation the plaintiff attempts to read into it; that if anything more whatsoever could have been done for the plaintiff's safety, a jury question as to the defendant's liability for failing to do so is presented. Even a cursory reflection upon the matter reveals the fallacy therein. Practically any type of industrial accident could in some way have been prevented by the application of precautions perceivable by hindsight. If nothing else, the plaintiff could have "stood in bed."

The Bailey case does emphasize the principles we have stated above. But it does not depart from the universal constant in the law of torts: that liability is predicated upon negligence: the failure to use reasonable care under the circumstances. That being so, the statement that liability results when "more could have been done" for the safety of the employee, must be understood as meaning "within the demands of reasonable care." This is the only way that such an idea can be reconciled with the commonly acknowledged rule as to what constitutes negligence.

Plaintiff also urges application to our case of certain language from Rogers v. Missouri Pacific Railroad:[7]

5. See cases in footnotes 3 and 4 above.
6. 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444.
7. 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493.

> ". . . The test of a jury case is simply whether the proofs justify with reason the conclusion that the *employer negligence played any part, even the slightest*, in producing the injury . . ." (Emphasis added.)

We do not understand the emphasized phrase, upon which plaintiff places great reliance in support of his position, as referring to the question whether negligence did or did not exist. It will be noted that the statement proceeds upon the assumption that there is negligence and refers to the quantum thereof. It says in effect that if there is negligence, which played any part in causing the plaintiff's injury, even the slightest, the defendant is responsible for whatever proportion of the damages it caused. But it does not suggest any the less necessity for finding negligence, nor that "even the slightest" fault might be found to be negligence.

With all sympathy for the plaintiff's misfortune, and every indulgence toward his claims, we are nevertheless unable to perceive any basis upon which the defendant can be held in violation of its duty to exercise reasonable care for his safety. Neither party can be blamed for the cold weather. Both were fully aware of it. However extensive the railroad's duty to its employees for their safety has become, it has never extended to the supervision of the attire of its section hands. This might involve niceties unwelcome to both parties. The plaintiff himself was in the best position to know how to dress himself for his work. It is to the credit of plaintiff's candor and honesty that he agreed with this in substance and said that he thought he was dressed all right; that he and the crew had worked under similar conditions on many occasions; and that neither he nor any crew

member complained about it. He made similar candid admissions about being kept in the cold, admitting that he had access to the fire and to the truck to warm himself at any time he wanted to. The evidence is that at only one time during the job did he mention being cold, and that this was while he and the others were warming themselves by the fire. It is so obvious as to hardly justify comment that plaintiff alone could know how cold he was; that he could best judge what to do about it and communicate the fact to others. What further the railroad could have done within the limits of reasonable care for the plaintiff's safety is not easy to conjure up. But his counsel must be given credit for enterprising efforts in that regard.

They claim reasonable care required these measures: (1) that the defendant should have put more men on the job, which would have shortened the time for the repair and plaintiff's exposure to the cold; and (2) that the "dutchman" (short section of rail) could have been placed in the break and left until morning when the repair could have been done more quickly in daylight and when it was not quite so cold. In so far as the record reveals, these claims are fashioned of nothing more substantial than conjecture and there is no reasonable basis to hold the railroad negligent on either count.

It must be appreciated that the railroad is in a business which literally moves on and must be kept moving. What can and should be done must be measured against its duty to maintain its road in the safest possible condition for its employees and the passengers and merchandise it transports. In the face of difficulties such as here arose it must resort to the best expedient avail-

able to meet these responsibilities and to keep its trains running on schedule. To fulfill these obligations the railroad called and relied on its section crew. Other than the reference to its attempt to try to get the one more crew member who couldn't be located, there is no evidence that more men or crews were available. Nor is it shown that additional men would have shortened the time required for the repair. The foreman testified that these rails must be loosened and moved one at a time so that more men could not have gotten at the work.

In regard to the contention that the defendant could have placed the "dutchman" in the track for the night and fix it in the morning, this undisputed testimony is pertinent: that it cannot be made sufficiently secure to rely on for trains at regular speeds; that there is danger of its breaking loose or turning sidewise, the consequences of which need not be detailed. For this reason trains must be slowed to not exceeding 20 miles per hour when it is in use. If this condition lasts very long, schedules are disrupted and trains are stalled. Thus it is plain that this device is only a temporary expedient to be used until the regular repair can be effected. To hold the defendant negligent not to have left it in all night would require an action that according to the evidence would almost certainly have been considered negligence if any mishap had occurred as a result of leaving it in for any longer than was absolutely necessary.

Notwithstanding the broad prerogatives of the jury in this case in determining the standard of reasonable care, where it appears that the railroad acted in good faith and exercised its judgment as to the proper

course to follow; and there is no evidence of failure to use reasonable care in doing so, the jury cannot be allowed to second guess the judgment of management and impose liability upon the railroad simply because a mishap such as the one of concern here occurred.

The writer believes it is unfortunate that there is not a compensation act so that this plaintiff and others similarly situated could be compensated for injuries suffered in performing the duties of employment without all of the tribulations and the risks involved in a contentious litigation to determine where fault lay, often as here, without success. But that is the responsibility of Congress.

From the evidence here it seems quite inescapable that it was the plaintiff's own conduct, with respect to his clothing and or in caring for his own person in the cold, that resulted in this regrettable injury. For this reason the judgment must be vacated. It is so ordered. Costs to defendant (appellant).

WE CONCUR:

.....

Lester A. Wade, Chief Justice

.....

F. Henri Henriod, Justice

.....

Roger J. McDonough, Justice

.....

E. R. Callister, Jr., Justice

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF UTAH

THE DENVER and RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Plaintiff and Respondent,* v. CLAUDE DENNIS, *Defendant and Appellant.*	No. 9543 (Original Opinion) FILED May 29, 1962 Clerk, Supreme Court, Utah

CROCKETT, Justice:

Defendant railroad appeals from a jury award in favor of plaintiff, an employee, who lost two fingers on his left hand as a result of frostbite while repairing track.

The case is grounded in the Federal Employers' Liability Act,[1] which allows a recovery even if the employee is contributorily negligent, requiring that the total award be diminished by the proportion his negligence bears to the whole. The jury awarded $20,000 damages and deducted one-half thereof for the plaintiff's negligence, leaving a net award of $10,000.

The essence of the railroad's appeal is that the evidence fails to show that it was guilty of any negligence.

1. 45 U.S.C., Sec. 51 et seq.

or that by any such conduct it contributed to cause plaintiff's injury.

In accordance with recognized appellate procedure, we must review the evidence in the light most favorable to the verdict.[2]

Plaintiff had worked as a section hand for the defendant for 16 years. He was part of a crew working out of Green River, Utah, where he and other members of the crew lived. On the night of January 2, 1960, the foreman, J. G. Chronopolous, called plaintiff and two other men to report for work with him at 5 p.m. He tried but was unable to locate a fifth man. The plaintiff was not dressed as warmly as the others. He was the only one without overshoes; and whereas the others wore woolen mittens, he wore two pairs of gloves: the inner pair of canvas and the outer pair of rubberized material. The foreman noticed and mentioned this fact, but the plaintiff said he would be all right. Plaintiff also testified that he had worked at other times, including nights, while similarly dressed and had been warm enough.

The assignment was to go in a truck to a point on the defendant's mainline about 18 miles west of Green River to repair what is called an "open joint" which had developed between the ends of rails because of their contraction due to the extremely cold weather. The procedure is to loosen eight or nine of the 40-foot rail lengths on either side of the open joint, one at a time, and move each slightly toward the open joint and thus

2. Johnson Ready-Mix Concrete Company v. United Pacific Ins. Co., 11 Utah 2d 279, 358 P.2d 337.

close it. During the procedure they use what is called a "dutchman": a short piece of rail, two or three inches in length, depending upon the necessity, to insert temporarily while trains are allowed to pass over it at reduced speed.

This particular job took nearly all night. The weather was bitter cold; there was snow on the ground and there was some wind. The recorded temperature at Green River was plus 10 degrees F. at 5 p.m. January 2, and minus 5 degrees at 5 a.m. the next morning. While the work was in progress, the men chopped up old ties and maintained a fire by which they warmed themselves intermittently. Their truck, which had a heater in it, was close by, its motor running at least part of the night, its lights being required to aid in the work. Particularly when a train would pass, the men would stay by the fire.

Plaintiff testified that he was cold; that the first indication of trouble with his hands came about midnight when he was loosening rail bolts with a large iron wrench about four feet long, he noticed his fingers seemed to be clamped to the wrench and he had to pry them loose. He said that at some time during the night he complained of being cold, and the foreman told him to get in the truck. He thought he was only in the truck about 30 minutes, but both of the older men and the foreman testified that he went to the truck about midnight and remained there the rest of the night until the repair was completed about 4 a.m. At about noon the next day when plaintiff awakened from his sleep he noticed that his fingers were painful and discolored, so he thought they must have been frozen. After reporting the matter

to his foreman and being examined by the doctor, he was hospitalized and treated for frostbite. It became necessary to amputate the little finger and the ring finger of his left hand; the former at the first joint from the knuckle and the latter at the knuckle. An added misfortune is that the middle finger on that hand had already been amputated some 22 years before because of an infection. Thus he now has only the thumb and index finger on that hand. The evidence is that he can still perform the duties of his employment as a section hand despite his loss of his fingers.

It will be conceded by all, including the defendant, that by the terms of the F.E.L.A. and the decisions of the U.S. Supreme Court[3] and this court[4] regarding its application, these principles are well established: that it imposes a high standard of care upon the railroad to safeguard its employees against injury; that the duty of care increases in proportion to the danger involved in the employment; that there must be a policy of extreme liberality in allowing the issues in such cases to be determined by a jury; and that if there is any evidence whatsoever to justify a reasonable belief that the railroad failed to exercise such precautions as reasonable care and prudence would dictate under the circumstances, the verdict must be sustained. But that is as far as the law goes. It is neither an insurance nor a compensation act. The right to recovery is based upon negligence.[5]

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3. See Wilkerson v. McCarthy, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497; Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916; Rogers v. Missouri Pacific RR. Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493.

4. See Stickel v. Union Pacific RR Co., 122 Utah 477, 251 P.2d 867.

5. See cases in footnotes 3 and 4 above.

To justify the submission of the case to the jury and the finding of negligence, the plaintiff sets forth what he calls "the more could have been done rule," stating that "this rule was well established in the case of Bailey v. Central Vermont Railway, Inc."[6] That case does not harmonize with the interpretation the plaintiff attempts to read into it; that if anything more whatsoever could have been done for the plaintiff's safety, a jury question as to the defendant's liability for failing to do so is presented. Even a cursory reflection upon the matter reveals the fallacy therein. Practically any type of industrial accident could in some way have been prevented by the application of precautions perceivable by hindsight. If nothing else, the plaintiff could have "stood in bed."

The Bailey case does emphasize the principles we have stated above. But it does not depart from the universal constant in the law of torts; that liability is predicated upon negligence; the failure to use reasonable care under the circumstances. That being so, the statement that liability results when "more could have been done" for the safety of the employee, must be understood as meaning "within the demands of reasonable care." This is the only way that such an idea can be reconciled with the commonly acknowledged rule as to what constitutes negligence.

Plaintiff also urges application to our case of certain language from Rogers v. Missouri Pacific Railroad:[7]

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6. 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444.
7. 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493.

> ". . . The test of a jury case is simply whether the proofs justify with reason the conclusion that the *employer negligence played any part, even the slightest*, in producing the injury . . ." (Emphasis added.)

We do not understand the emphasized phrase, upon which plaintiff places great reliance in support of his position, as referring to the question whether negligence did or did not exist. It will be noted that the statement proceeds upon the assumption that there is negligence and refers to the quantum thereof. It says in effect that if there is negligence, which played any part in causing the plaintiff's injury, even the slightest, the defendant is responsible for whatever proportions of the damages it caused. But it does not suggest any the less necessity for finding negligence, nor that "even the slightest" fault might be found to be negligence.

With all sympathy for the plaintiff's misfortune, and every indulgence toward his claims, we are nevertheless unable to perceive any basis upon which the defendant can be held in violation of its duty to exercise reasonable care for his safety. Neither party can be blamed for the cold weather. Both were fully aware of it. However extensive the railroad's duty to its employees for their safety has become, it has never extended to the supervision of the attire of its section hands. This might involve niceties unwelcome to both parties. The plaintiff himself was in the best position to know about the sufficiency of his clothing. The foreman with justification observed that he thought a man who had worked on that job for many years ought to know how to dress himself for his work. It is to the credit of the

plaintiff's candor and honesty that he agreed with this in substance and said that he thought he was dressed all right; that he and the crew had worked under similar conditions on many occasions; and that neither he nor any crew member complained about it. He made similar candid admissions about being kept in the cold, admitting that he had access to the fire and to the truck to warm himself at any time he wanted to. It is undisputed that the only time he mentioned being cold the foreman suggested that he go to the truck for that purpose and he did so. It is so obvious as to hardly justify comment that plaintiff alone could know how cold he was; that he could best judge what to do about it and communicate the fact to others. What further the railroad could have done within the limits of reasonable care for the plaintiff's safety is not easy to conjure up. But his counsel must be given credit for enterprising efforts in that regard.

They claim reasonable care required these measures: (1) that the defendant should have put more men on the job, which would have shortened the time for the repair and plaintiff's exposure to the cold; and (2) that the "dutchman" (short section of rail) could have been placed in the break and left until morning when the repair could have been done more quickly in daylight and when it was not quite so cold. In so far as the record reveals, these claims are fashioned of nothing more substantial than conjecture and there is no reasonable basis to hold the railroad negligent on either count.

It must be appreciated that the railroad is in a business which literally moves on and must be kept moving. What can and should be done must be measured against

its duty to maintain its road in the safest possible condition for its employees and the passengers and merchandise it transports. In the face of difficulties such as here arose it must resort to the best expedient available to meet these responsibilities and to keep its trains running on schedule. To fulfill these obligations the railroad called and relied on its section crew. Other than the reference to its attempt to try to get the one more crew member who couldn't be located, there is no evidence that more men or crews were available. Nor is it shown that additional men would have shortened the time required for the repair. The foreman testified that these rails must be loosened and moved one at a time so that more men could not have gotten at the work.

In regard to the contention that the defendant could have placed the "dutchman" in the track for the night and fix it in the morning, this undisputed testimony is pertinent: that it cannot be made sufficiently secure to rely on for trains at regular speeds; that there is danger of its breaking loose or turning sidewise, the consequences of which need not be detailed. For this reason trains must be slowed to not exceeding 20 miles per hour when it is in use. If this condition lasts very long, schedules are disrupted and trains are stalled. Thus it is plain that this device is only a temporary expedient to be used until the regular repair can be effected. To hold the defendant negligent not to have left it in all night would require an action that according to the evidence would almost certainly have been considered negligence if any mishap had occurred as a result of leaving it in for any longer than was absolutely necessary.

Notwithstanding the broad prerogatives of the jury in this case in determining the standard of reasonable care, where it appears that the railroad acted in good faith and exercised its judgment as to the proper course to follow; and there is no evidence of failure to use reasonable care in doing so, the jury cannot be allowed to second guess the judgment of management and impose liability upon the railroad simply because a mishap such as the one of concern here occurred.

The writer believes it is unfortunate that there is not a compensation act so that this plaintiff and others similarly situated could be compensated for injuries suffered in performing the duties of employment without all of the tribulations and risks involved in contentious litigation to determine where fault lay, often as here, without success. But that is the responsibility of Congress.

From the evidence here it seems quite inescapable that it was the plaintiff's own neglect, or error of judgment, with respect to his clothing and or in caring for his own person in the cold, that resulted in his injury. For this reason the judgment must be vacated. It is so ordered. Cost to defendant (appellant).

WE CONCUR:

Lester A. Wade, Chief Justice

F. Henri Henriod, Justice

Roger I. McDonough, Justice

E. R. Callister, Jr., Justice

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF UTAH

Regular Term, 1962 — May 29, 1962

CLAUDE DENNIS,
Plaintiff and Respondent,

v.

THE DENVER and RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,
Defendant and Appellant.

REMITTITUR
No. 9543

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be, and the same is, reversed. Costs to appellant.

(ON PETITION FOR REHEARING)

Regular May Term, 1962 — August 7, 1962

On consideration of the Petition for Rehearing

heretofore filed herein, and the arguments of counsel thereupon had, it is ordered that a Rehearing be, and the same is, denied.

Issued August 7, 1962.

APPENDIX D

PERTINENT PARTS OF FEDERAL EMPLOYERS' LIABILITY ACT

45 U.S.C.A., Sec. 51:

LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of

interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685 §1, 53 Stat. 1404.

45 U.S.C.A., Sec. 53:

CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapte: to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, §3, 35 Stat. 66.

45 U.S.C.A., Sec. 54:

ASSUMPTION OF RISKS OF EMPLOYMENT

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 25

CLAUDE DENNIS, *Petitioner*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS MCCARTHY,
CLIFFORD L. ASHTON,
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Suite 300,
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Salt Lake City, Utah

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 535

CLAUDE DENNIS, *Petitioner,*

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is published at 372 P. 2d 3. An amended opinion has not yet been reported but is attached to petitioner's brief.

QUESTIONS PRESENTED

In opposition to the Petition for Writ of Certiorari the respondent respectfully presents the following propositions:

POINT I.

THIS IS NOT A PROPER CASE FOR CERTIORARI REVIEW.

POINT II.

THE UTAH SUPREME COURT DID NOT ERR IN HOLDING THAT THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE RAILROAD COMPANY.

POINT III.

THE UTAH COURT DID NOT MISCONCEIVE OR MISAPPLY THE FEDERAL EMPLOYERS' LIABILITY ACT.

STATEMENT OF THE CASE

On January 2, 1962, two "open joints" were reported to the respondent railroad company on its main line near Green River, Utah (R. 221). Green River is one of the most remote areas of respondent's line. The two available section crews residing in the vicinity were immediately dispatched, one to each joint, to make immediate repair. Petitioner was a member of one of those crews. He claims damages for frostbite which occurred during the repair operations.

In railroading an "open joint" is considered an emergency which must be corrected immediately (R. 229). Since the track where the repairs were being made was the main line, it had to be kept open for service during repair. This was done by placing a small piece of rail (dutchman) in the opening over which trains passed at reduced speeds until the joint was closed. The use of a dutchman is strictly a temporary measure. Until the joint is closed and per-

manently secured, the "open joint" (even with dutchman inserted) presents a threat of derailment (R. 229-230) and seriously slows and impedes rail traffic (R. 231).

Petitioner and his fellow sectionmen left Green River about 5:30 o'clock p.m. on the night of January 2 and traveled approximately 18 miles to the repair site (R. 197). Upon arriving at the site with the truck, the men split up a tie and built a fire (R. 136). When this fire burned out, the men built another (R. 148). During the course of repair operations the men would go over to the fire to warm themselves when they felt cold (R. 212). Petitioner testified that he was free to go over to the fire if he got cold (R. 148, 149). Petitioner was not as warmly dressed as the other members of the crew. He was the only one who was not wearing overshoes or woolen mittens (R. 132, 133). In place of woolen mittens he wore a rubberized glove with a canvas glove beneath it. Petitioner testified that it was his obligation to furnish clothing adequate for the occasion (R. 133, 149) and that he provided himself with what he figured was adequate to protect him against the cold (R. 133).

Petitioner intermittently worked on the line and warmed himself by the fire. He testified that at about midnight he had some difficulty in separating his fingers to get his glove off and that he remarked, "It looks like my hand's frozen to that wrench" (R. 108). This is the only remark which petitioner claims to have made about his hand or fingers while he was on the job. Petitioner further testified that he continued to work until about 4:00 o'clock a.m. and that the crew then returned to Green River about 5:00 o'clock a.m. (R. 111).

Petitioner's counsel called Dr. Reed Clegg, who testified on hypothetical facts that petitioner had suffered from frostbite. On cross examination, Dr. Clegg testified that

inadequate clothing, and in particular cold feet, would contribute to lowering of body temperature and thus to frostbite on vulnerable members of the body (R. 165). He further testified that adequate clothing can protect against any weather condition (R. 163, 164).

At the close of the petitioner's case the respondent moved the court for a directed verdict on the ground that there was no evidence of negligence on the part of the railroad company and that the undisputed evidence demonstrated that the sole cause of petitioner's frostbite was his own failure to properly clothe and protect himself from the cold. The court denied this motion and subsequently denied respondent's motion for judgment notwithstanding the verdict. On appeal the Supreme Court of Utah reversed.

ARGUMENT

POINT I.

THIS IS NOT A PROPER CASE FOR CERTIORARI REVIEW.

As a preface to its review of the evidence the Utah Supreme Court in its opinion said:

> "... there must be a policy of extreme liberality in allowing the issues in such cases [FELA cases] to be determined by a jury; and ... if there is any evidence whatsoever to justify a reasonable belief that the railroad failed to exercise such precautions as reasonable care and prudence would dictate under the circumstances, the verdict must be sustained...." (372 P. 2d 3, 5)

The Utah court took express recognition of the principles laid down by this court in *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, and *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed.

2d 493. Upon a painstaking review of the record the court concluded that the evidence and inferences to be drawn therefrom were insufficient to present a jury issue as to the negligence of the respondent.

There is no basis whatever for any claim that the Supreme Court of Utah has displayed hostility to enforcement of the governing rules of the Federal Employers' Liability Act. On the contrary, the Supreme Court of Utah has demonstrated an understanding of the Act and its liberal interpretation and has shown a willingness, if not an eagerness, to enforce the rules laid down by this court.

See e.g.:

Butz v. *Union Pacific R. Co.*, 120 Utah 185, 232 P. 2d 332;

Mooney v. *Denver and Rio Grande Western R. Co.*, 123 Utah 224, 257 P. 2d 947;

Wheat v. *Denver and Rio Grande Western R. Co.*, 122 Utah 418, 250 P. 2d 932;

Maxfield v. *Denver and Rio Grande Western R. Co.*, 8 Utah 2d 183, 330 P. 2d 1018;

Lemmon v. *Denver and Rio Grande Western R. Co.*, 9 Utah 2d 195, 341 P. 2d 215.

The only matter at issue here is whether or not the lower court has properly appraised the facts of the case. Petitioner contends that it has not. Respondent urges that the lower court's appraisal will withstand the most rigorous requirements laid down by this court.

In *United States* v. *Johnston*, 45 S. Ct. 496, 268 U.S. 220, this court said:

> "We do not grant a certiorari to review evidence and discuss specific facts."
>
> (45 S. Ct. 496, 497, 268 U.S. 220, 227)

Respondent respectfully submits that there are no "special and important" reasons for granting a certiorari in this case as contemplated by the 19th rule of this court.

POINT II.

THE UTAH SUPREME COURT DID NOT ERR IN HOLDING THAT THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE RAILROAD COMPANY.

An employee's right to compensation under the Federal Employers' Liability Act is predicated on employer negligence. In the absence of an evidentiary basis for a finding of employer negligence it is the duty of an appellate court to set aside a verdict for the employee.

Brady v. *Southern Ry. Co.*, 320 U.S. 476, 64 S. Ct. 232;

New York, New Haven & Hartford R.R. Co. v. *Henagan*, 364 U.S. 441, 81 S. Ct. 198.

While fault remains the basis of railroad liability, the duty of an appellate court to protect the right of the railroad against unfounded jury verdicts is just as important as its duty to preserve the employee's right to a verdict where there are probative facts to support it.

Petitioner proceeds upon the assumption that the railroad company has a duty to protect him from "any and all sorts of harm" (Page 5, Petitioner's Brief).

Petitioner has represented to this court that his injury was the result of exposure to cold while in the course of a "routine" repair performed under the supervision of a domineering foreman who had failed to obtain the necessary help of other available men. This contention is founded upon a complete distortion of the evidence.

The repair of an open joint is considered by the railroad industry to be an emergency operation and not a "routine" repair (R. 229). The threat of derailment on a main line requires the immediate action of a section crew and their continued effort until a permanent repair is effected. The use of a dutchman is a necessary expedient to keep trains moving at reduced speeds during repair operations, but may not be employed as a repair measure because of its tendency to turn out of alignment and be caught by the wheels of the train (R. 230). In addition to the threat of derailment, the open joint with dutchman inserted seriously slows and impedes rail traffic (R. 231). In this case the joint was on respondent's main line which carried scheduled passenger trains and several high speed freight trains, delay of which affected traffic on the entire intercontinental line (R. 224-226). This was not a "routine" repair.

Nor was there any evidence whatever that petitioner failed to avail himself of available warming facilities because of the words or conduct of the foreman or of any other employee. Petitioner testified that he was free to go to the fire when he got cold (R. 148, 149). Other members of the crew went to the fire whenever they got cold (R. 212). Petitioner did not testify that he felt any supervisory restraint or moral compulsion which prevented his use of the fire on more frequent occasions during the work shift.

The statement of petitioner's counsel that "a track maintenance crew worked out of Cedar, Utah but was not called" (Page 6, Petitioner's Brief) is also incorrect. The evidence disclosed that two open joints were reported on the same day and the Cedar crew was dispatched to close one of these joints (R. 223). This crew was engaged in the same emergency operation as petitioner's Green River crew. All available men in the isolated area of the open joint were pressed into service to complete the repair.

Petitioner's counsel list on pages 14 and 15 of their brief various things which might have been done to protect petitioner from the cold. Most of these "ideas" have been conceived since the decision of the Utah Supreme Court.

The contention that an additional crew should have been provided is inconsistent with the evidence. There was no additional crew available in this remote area to assist in the emergency operation. Petitioner's only effort to prove availability of additional help was his statement that one Delmar Powell of Green River could have been called to help. The evidence shows that he was called by the foreman but could not be contacted (R. 196). Furthermore, the evidence showed that the four-man crew who worked on the joint in this instance was as large a crew as ever required to reduce an open joint and that in isolated areas it was common to do such work with two or three men (R. 233, 234). The elements of necessity, notice and opportunity were absent. Finally, there is no evidence whatever to support the conclusion that insufficient help was the cause of petitioner's frostbite or that the work could have been done more safely with additional help.

Petitioner next suggests that the job should have been postponed until morning. This argument ignores the duty of the respondent to maintain its line in safe condition for its employees and the passengers and property it transports. Petitioner admitted that at least six trains would pass during the night (R. 120). Each would be subject to the delay and possibility of derailment attendant the presence of an open joint or dutchman. Petitioner has no answer for the Utah Supreme Court's observation that:

> "To hold the defendant negligent not to have left it [the dutchman] in all night would require an action that according to the evidence would almost certainly have been considered negligence if any mishap had occurred as a result of leaving

> it in for any longer than was absolutely necessary." (372 P. 2d 3, 7)

The respondent not only acted reasonably in proceeding with immediate repair, but it had a duty to do so.

The same comment is applicable to petitioner's contention that the crew should have worked a short shift and then returned the next morning. Respondent was required to reduce the joint as soon as possible.

The suggestion that the crew could have been taken to Green River for an hour's warming is nothing but a hollow afterthought. The heater in the truck and the fires built of ties were available and were actually used by the members of the crew when they became cold. Petitioner's contention that he should have been sent back to obtain additional clothing is in the same category. He acknowledged his responsibility to provide his own clothing for the job; testified that he was the best judge of his needs; that he thought he was dressed warmly enough and that he made no complaint about inadequate clothing. The final contention made by petitioner is that he should not have been sent 300 yards to get the truck during the repair operations. Petitioner assumes here that the walk to the truck and return in the heated cab enhanced the chances for frostbite and that the respondent was therefore negligent in sending petitioner as opposed to another employee. Both assumptions are unsupported by evidence or reason.

Petitioner goes to great lengths to attempt to show that the Utah Supreme Court inappropriately resolved facts and misconceived the law. Sentences of the opinion are isolated and attacked. The explanation for the divergence in the court's statement of the facts and the position of petitioner's counsel is that counsel rely upon petitioner's

state of mind (which he did not communicate or testify to), inferences to be drawn from testimony not offered, and distortion of the evidence received. The attempt to show misconception of the law is founded upon such things as niceties of the word "conjecture" and the claimed improper distinction of the *Rogers* case. The statements of the court taken in context demonstrate that the court's concept of the law is correct.

The only case cited by petitioner dealing with exposure to weather is *Anderson* v. *Atchisin T. & S. F. R. Co.*, 333 U.S. 821, 68 S. Ct. 854, 92 L. Ed. 1108. The evidence in that case disclosed that the railroad employee (a train conductor) fell from a train and injured himself. In his helpless condition he was exposed to bitter cold weather over a period of several hours which resulted in his death. This court held that the train employees could be found negligent in failing to make efforts of any kind to ascertain and save him from his probable peril. The case has no bearing on the facts of the instant case.

At page 23 of their brief petitioner's counsel cite state and circuit court decisions to show that the Utah court erred in its statement that the railroad has no duty to supervise the attire of its employees. These cases pertain to special safety equipment such as goggles, helmets, respirators and life saving equipment. None of them hold that the railroad is responsible for the clothing worn by its employees. If petitioner makes the claim that the respondent is responsible for his attire, it is another claim that has been fashioned by him since the opinion below. At the trial petitioner testified (R. 133):

> "Q. Now in this kind of work you men furnish your own clothing, do you not?
>
> A. That's right.

Q. And that is the custom and practice on the railroad for sectionmen to furnish all of their own clothing?

A. Yes.

Q. So you yourself provide yourself with what you think is sufficient clothing to protect you against the cold?

A. Yes, sir."

And again (R. 149):

"Q. ... You sectionmen accept the responsibility of clothing yourself for the kind of weather you are exposed to on the particular railroad job?

A. We furnish our own clothes, yes.

Q. And it is the custom and practice and has been ever since you have worked for the railroad for you men to do that yourself?

A. Yes, sir."

Petitioner testified that he thought his clothing sufficient and that no one cautioned him to the contrary (R. 132, 133). He was the only member of the crew without woolen mittens and overshoes (R. 132, 133).

The explanation for the petitioner's frostbite does not lie in the tenuous claims of employer negligence conjured up by his ingenious counsel. The testimony of petitioner's physician, called as his own witness, furnishes the answer (R. 163, 164):

"Q. Doctor, I appreciate that cold is what causes frostbite and the common protection against cold is adequate clothing is it not, doctor?

A. Yes, sir.

Q. You certainly would think it would be reasonable to assume that people could protect themselves by adequate clothing against a temper-

ature of five degrees above zero and five degrees below, would you not, doctor?

• • •

A. Well, I would say that no matter how cold it gets, if you have sufficient clothing this should be protection against it."

POINT III.

THE UTAH COURT DID NOT MISCONCEIVE OR MISAPPLY THE FEDERAL EMPLOYERS' LIABILITY ACT.

Under Point II of his brief petitioner asserts that the Utah Supreme Court set aside his verdict by "resort to the simple expediency of calling contributory negligence, in effect, 'sole proximate cause'" (Page 30, Petitioner's Brief). It is difficult to follow this argument in light of the fact that the greater part of petitioner's brief is devoted to the proposition that the Utah Supreme Court erred in holding that there was no evidentiary basis for a finding of employer negligence. The holding of no employer negligence compelled reversal without any consideration of contributory negligence and its causal connection with the injury. Neither the issue of contributory negligence nor the doctrine of sole proximate cause were discussed in the opinion of the Supreme Court of Utah.

Under Point III of his brief petitioner asserts that the doctrine of assumed risk was revived to defeat his recovery. The Utah Supreme Court has not held that petitioner's recovery is barred by his own conduct. It is nowhere suggested that the railroad has a defense to this action because of anything done or omitted by petitioner. The court below has simply held that there are no probative facts showing

employer negligence. In the concluding paragraphs of its opinion the lower court said:

> "Notwithstanding the broad prerogatives of the jury in this case in determining the standard of reasonable care, where it appears that the railroad acted in good faith and exercised its judgment as to the proper course to follow; and there is no evidence of failure to use reasonable care in doing so, the jury cannot be allowed to second guess the judgment of management and impose liability upon the railroad simply because a mishap such as the one of concern here occurred."
>
> (372 P. 2d 3, 7)

Point III of petitioner's brief is simply an attempt to write something into the lower court opinion to justify a basis for argument.

CONCLUSION

The opinion of the Supreme Court of Utah reflects a conscientious effort to canvass the facts in light of the decisions of the United States Supreme Court. It is respectfully submitted that the analysis made by the Utah court will withstand the most rigorous tests laid down by the decisions construing the Federal Employers' Liability Act. There is no evidence or indication whatever of state court disrespect or hostility to the Federal Employers' Liability Act or the decisions of this court. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 25

In the Supreme Court of the United States

October Term, 1962

CLAUDE DENNIS, *Petitioner,*

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent.*

BRIEF OF PETITIONER

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On Writ of Certiorari to the Supreme Court of Utah

Petition for Certiorari Filed October 18, 1962
Certiorari Granted January 7, 1963

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No. 535

In the Supreme Court of the United States

October Term, 1962

CLAUDE DENNIS, *Petitioner,*

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent.*

BRIEF OF PETITIONER

OPINION BELOW

The opinion below was filed in the Utah Supreme Court on May 29, 1962, Case No. 9543, and is reported at 13 Utah 2d 249, 372 P.2d 3.

JURISDICTION

Jurisdiction for writ of certiorari is sustained by 62 Stat. 929 (3), 28 U.S.C.A. §1257 (3).

STATUTES INVOLVED

The Statutes of the United States here applicable are 45 U.S.C.A., Section 51-60, commonly known as

the Federal Employers' Liability Act. See 35 Stat. 65, as amended by 36 Stat. 291 and 53 Stat. 1404. Sections 51,53, and 54 are set forth in Appendix A.

QUESTIONS PRESENTED FOR REVIEW

The Supreme Court of Utah set aside a jury verdict for petitioner in a case filed by a railroad employee under the Federal Employers' Liability Act. The question presented for review is whether that holding is in conflict with controlling decisions of the United States Supreme Court. It is petitioner's position that the Utah Court improperly held as a matter of law:

(a) That respondent was not negligent in overexposing petitioner to freezing weather.

(b) That petitioner's own conduct was the sole proximate cause of his injuries; and

(c) That petitioner assumed all risks incident to his employment.

The decision of the Utah Court is in conflict with *Anderson v. Atchison, T. & S.F.R. Co.*, 333 U.S. 821, 68 S.Ct. 854, 92 L.Ed. 1108 (1948); *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943); *Blair v. Baltimore & O.R.Co.*, 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490 (1945); *Boston & Maine Railroad v. Meech*, 156 F.2d 109 (1st Cir. 1946) (Cert. Den. Oct. 28, 1946), 329 U.S. 763, 67 S.Ct. 124, 91 L.Ed. 658; *Coray v. Southern Pacific Co.*, 112 Utah 166, 185 P.2d 963, 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208 (1949); *Davis v. Virginian R. Co.*, 361 U.S. 354, 80 S.Ct. 387, 4 L.Ed.2d 366 (1960); *Ellis*

v. Union Pacific R. Co., 146 Neb. 397, 19 N.W.2d 641, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572 (1947); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 77 S.Ct.457, 1 L.Ed.2d 511 (1957); *Harris v. Pennsylvania R.Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed. 2d 1 (1959); *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946); *Lillie v. Thompson*, 332 U.S. 459, 68 S.Ct. 140, 92 L.Ed. 73 (1947); *Pauly v. McCarthy*, 109 Utah 398, 166 P.2d 501, 330 U.S. 802, 67 S.Ct. 962, 91 L.Ed. 1261 (1947); *Ringhiser v. Chesapeake & Ohio R. Co.*, 354 U.S. 901, 77 S.Ct. 1093, 1 L.Ed.2d 1268 (1957); *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957); *Tennant v. Peoria & P.U.R.Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944); *Tiller v. Atlantic Coast Line R.Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943); *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) *Webb v. Illinois Central R.Co.*, 352 U.S. 512, 77 S.Ct 451, 1 L.Ed.2d 503 (1957); *Wilkerson v. McCarthy*, 112 Utah 300, 187 P.2d 188, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1947).

Some of the language from the above cases is particularly applicable here. In *Lavender v. Kurn*, supra, this court stated:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.
>
> "But where, as here, there is an evidentiary basis for the jury's verdict, . . . the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference

or feel that another conclusion is more reasonable."

In *Tennant v. Peoria & P.U.R.Co.*, supra, this court stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury . . . It is the jury, not the court, which is the fact-finding body . . . the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

In *Bailey v. Central Vermont R. Co.*, supra, this court stated:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

And in *Rogers v. Missouri Pacific R. Co.*, supra, this court stated:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer *played any part at all* in the injury or death." (Italics ours.)

This Court has recognized that a railroad's duty to exercise reasonable care extends to protection of its employees from any and all sorts of harm. See *Lillie v. Thompson*, supra, (unprotected telegraph operator criminally assaulted); *Urie v. Thompson*, supra, (exposure to silica dust); *Anderson v. Atchison, T.& S.F. R.Co.*, supra, (exposure to weather).

Since filing of the Petition for Writ of Certiorari, the Second Circuit Court of Appeals decided the case of *Thomas Hayes v. New York Central R.Co.*, 311 F.2d 198, (Dec. 18, 1962). In the Hayes case the court affirmed a verdict under the FELA for a casual employee who worked over a twenty-seven-hour period shoveling snow from switches in defendant's railroad yard and who suffered injury from frostbite. During said twenty-seven hours plaintiff was given four breaks of forty-five minutes to an hour each for eating and coffee. The temperature ranged from six to twenty-two degrees Fahrenheit, with high winds. The court held that the railroad had an affirmative duty of exercising ordinary care in safeguarding its employees from inclement weather.

STATEMENT OF THE CASE

Petitioner, a fifty-five-year-old section hand, filed this action to recover damages for injuries sustained by him in the course of his employment on the night of January 2-3, 1960, near Green River, Utah. He claimed that respondent negligently required him to work an overtime, hastily planned shift of twelve hours on a windswept night in zero temperature, without ade-

quate warming facilities, in order to perform a routine repair of an open joint; and that as a result he suffered frostbite, necessitating amputation of two fingers on his left hand. (R. 1-3.) The evidence supported his claim.

The track maintenance crew, of which petitioner was a member, was called on Saturday evening, January 2, 1960, to repair an open joint on the mainline track, approximately sixteen miles west of Green River. The crew consisted of the foreman, a truck driver, and two laborers, one of whom was petitioner. (R. 24,25,) Another crew member, Delmar H. Powell, could not be located. (R.24,100,101.) A track maintenance crew worked out of Cedar, Utah, but was apparently working elsewhere. The open joint was slightly in the Cedar crew's territory. (R. 22,23,26.)

A joint is the convergence point of two lengths of rail. Joints are fastened together by angle bars, bolts, and nuts on each side of the rails. An open joint is caused by the contracting of rails in extremely cold weather to the point where the bolts on one side of a joint are sheared, thus causing an undesired separation. (R. 26,28.29) The rails at the open joint in question were approximately one and three fourths of an inch apart. (R.29.) Petitioner did not classify repair of an open joint as an emergency. (R. 23,49,69.) He testified that by use of a "dutchman" this particular work could safely have been postponed until morning. (R. 43-45, 60,61.)

The repair of an open joint is accomplished by loosening the nuts on the bolts at each joint, continuing

from the open joint for approximately nine joints in each direction. (R.33.) The rails are thirty-nine feet in length. (R. 26.) After the nuts are loosened, a chisel is used to pry the rails at the open joint close enough together so that new bolts and nuts can be used at the place where the old ones have been broken. (R.33-35.) A wrench approximately four feet in length is used to loosen the nuts.

The crew met at the toolhouse near the Green River depot at approximately 5:00 p. m. The weather was "awful cold," (R. 25.) the weather report indicating a temperature of ten degrees Fahrenheit, growing colder during the night to five degrees below zero Fahrenheit, at 5:00 a. m. (Pl.Ex. 3-P; R. 76,138.) Petitioner wore heavy underwear, levi-type waist overalls, heavy shirt, heavy jacket, sheepskin coat, heavy socks, work shoes, and two pair of gloves, inner canvas gloves with flannel material on the inside, and outer rubberized canvas gloves. (R. 25, 72,73.) Petitioner was the only crew member not wearing overshoes. (R. 25,55,85,101.)

Dr. Reed Clegg testified that when a person's body temperature is reduced, his extremities are more subject to frostbite. Therefore, a person having cold feet is more subject to frostbite of his hands. (R. 76.)

Foreman Chronopoulos testified:

> "Q. *Now you say that you noticed that when Mr. Dennis came out to report for the job, you thought that he wasn't dressed warmly enough, is that correct?*
>
> "A. *That's correct.*" (R. 108.)

The crew was taken by truck to milepost 571, where it was met by signal maintainer Wernz. They proceeded by motorcar approximately three fourths of a mile to where the open joint was located. Wernz left. The crew then inserted a "dutchman." A "dutchman" is a small piece of rail which can be inserted at an open joint by removing the angle bars, inserting the "dutchman," replacing the angle bars, and tightening the nuts and bolts on one side of the joint. With a "dutchman" thusly inserted trains can be slowed down and moved across a joint at from fifteen to twenty miles per hour. (R. 29,30,43,67.)

As soon as the "dutchman" was inserted, the foreman sent petitioner for the truck, *which necessitated walking approximately three hundred yards through eight to ten inches of snow.* (R. 31,33.)

After the truck was driven to the site, a tie was removed and used in making a fire. The fire was ineffective because of the severe wind which was blowing from the west through the cut in which the open joint was located. (R. 31,33.)

At first the four men worked in pairs, with one pair proceeding west and one east from the open joint. One man would hold a lamp, and the other would work with the wrench. (R. 112-114.) Later the four men worked together on one side, with two or three men working and the foreman supervising. (R. 34-36.) The truck driver moved the truck at intervals, using the truck lights to assist with the work. (R. 113.)

Petitioner testified that he was cold and that using the metal tools contributed to the coldness of his hands.

(R. 34,35.) He had never before worked at nighttime in weather that cold. (R. 23,51,53.)

The foreman supervised the crew throughout the night. He testified as follows:

> "Q. Mr. Chronopoulos, you have been the Section Foreman in that Green River area for several years, have you?
>
> "A. I have.
>
> "Q. But as a Section Foreman, you are the person who is in charge out there, are you not?
>
> "A. I am.
>
> "Q. And you make the decisions, do you?
>
> "A. I do.
>
> "Q. And you tell the men what to do, when to do it and how to do it?
>
> "A. That's right." (R. 108.)

Under the supervision of the foreman the men took regular turns at the fire. Petitioner testified:

> "A. We would alternate to go to the fire unless a train was going by and then we was all over there at the same time." (R. 68.)

A train was waiting at the open joint when the crew arrived. As soon as the "dutchman" was installed, it proceeded on its way. Two additional trains passed along the track during the night. (R. 66,102.)

At approximately midnight, while at the fire, petitioner had to pry the fingers of his left hand from the wrench and so advised the foreman. (R. 35,36.)

> "Q. All right, now tell us what happened?
>
> "A. I went to the fire—all of us went to the fire

while the train was going by and I laid the wrench down there and when I did these two fingers were clamped shut and I had to pull them apart like that before I could get my glove off.

"Q. All right now, you are pointing to fingers on your right hand?

"A. Yes, I mean to this hand of course.

"Q. Those were fingers on your left hand?

"A. Yes, the little finger and the ring finger.

"Q. All right, what feeling or sensation did you notice in [fol. 109] the fingers at that time?

"A. Well, it started to burning more or less like your hand has been asleep and waking up or your foot; kind of burning, tingling sensation.

"Q. Was there any other feeling that you noticed?

"A. Well, not at that time.

"Q. All right now, did you say anything about this to anyone?

"A. Yes, I mentioned it to —

"Q. Who to?

"A. They were — well, they were all right there at the fire,

"Q. *Was the foreman there too?*

"A. *Foreman and the other two men.*

"Q. *What did you say?*

"A. *I said, 'it looks like my hana s frozen to that wrench.'*

"Q. *All right now, after that was the work continued?*

"A. *Yes.*

"Q. *And did the foreman, Mr. Chronopoulos, did he continue to supervise this work?*

"A. *Yes, he was there all the time.*" (R. 35, 36.)

The foreman admitted that Dennis complained of the cold.

"Q. Now during this particular night, Mr. Chronopoulos, did Mr. Dennis complain to you about the cold?

"A. He did.

"Q. About what time was that?

"A. Well, I would judge about around midnight." (R. 104.)

Later in the evening the batteries on the lights grew weak, and the lights on the truck were used to help light the area. Petitioner went to the truck at the end of the shift for the purpose of turning the truck around. This took "not over thirty minutes altogether." (R. 64.)

The work was finished at approximately 4:00 a.m. The crew returned in the truck to Green River, arriving at approximately 5:00 a.m., making a total working time of twelve hours, with no coffee or lunch breaks and no rest period. (R. 37.) A regular shift is eight hours. (R. 23.)

As heretofore indicated, repair of the open joint was not an emergency and use of the "dutchman," a flagman, and issuance of special slow-down train orders would have made it practical to have delayed the work until morning. (R. 43-46,60,61.) Petitioner testified that by working in daylight the open joint could have

been repaired in four hours. (R.45.) He also testified that by utilizing an extra crew and working by daylight the work could have been completed in two hours. An additional crew working at night would have shortened the task to four hours. (R. 45.)

After arriving home, petitioner noticed tingling, burning, and discoloration of his left hand. He went to see the doctor that same morning and received medication. Later he was hospitalized and underwent amputation of the little and ring fingers of his left hand. (R.38-41.)

The jury returned a verdict in the gross amount of $20,000.00 reduced to $10,000.00 for contributory negligence. (R.7.)

The Supreme Court of Utah rendered its opinion on May 29, 1962, vacating petitioner's judgment. Thereafter petitioner filed a petition for rehearing which was denied on August 7, 1962. In the meantime, the Utah Supreme Court corrected the original opinion by deleting several factual errors which had been called to its attention by petitioner. See Appendices A and B of Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The decision of the Utah Supreme Court setting aside the verdict in favor of petitioner is based on the following prejudicial and reversible errors:

1. The Supreme Court of Utah improperly held as a matter of law that respondent was not negligent in overexposing petitioner to freezing weather.

The impropriety of the Utah court's decision becomes manifest in the light of the following facts:

(a) When the crew first met at Green River, the foreman was of the opinion that petitioner was inadequately dressed and yet allowed him to proceed with the crew to the all-night task of repairing the open joint.

(b) The foreman worked his crew steadily for twelve hours in nighttime, zero, windswept weather, without a single break for coffee, lunch, or rest.

(c) Petitioner complained of his fingers being frozen to the wrench at midnight, and the foreman did nothing to afford him protection from a known danger, nor did he relieve him from his assignment in repairing the joint.

(d) The danger of injury from overexposure could easily have been eliminated.

2. The Supreme Court of Utah improperly held as a matter of law that petitioner's negligence "with regard to his clothing and/or in caring for his own person in the cold" was the sole proximate cause of his injuries.

The evidence is that both petitioner and the foreman were exposed to the same weather conditions. They were equally capable of drawing logical conclusions as to the likelihood of injury from exposure. In addition, the foreman was in charge of the crew. He alone could furnish petitioner transportation sixteen miles to the safe refuge which the Utah court apparently felt petitioner should have sought. He formed the opinion that petitioner was not warmly enough dressed before the

crew left Green River, yet he sent petitioner through three hundred yards of snow without overshoes. *He was advised at midnight that petitioner's fingers were frozen to the wrench; and he kept petitioner in the cold working on the joint for an additional three and one-half hours.* In the face of the foregoing facts, the Utah court placed sole blame on petitioner for his "error in judgment" in not "caring for his own person in the cold."

3. The Supreme Court of Utah improperly resurrected the doctrine of assumption of risk as a bar to petitioner's right of recovery.

The Utah Supreme Court has held that petitioner's conduct "in caring for his own person" was the sole cause of his injury. This holding approves and supports the attitude of Foreman Chronopoulos, when he testified that he *knew* petitioner was inadequately clothed but took no measures to protect him from over-exposure, because "the railroad has no responsibility" and "it isn't my responsibility either . . ." (R. 108.) The decision of the Utah court, regardless of the label, is nothing more nor less than another attempt to revive assumption of risk as a defense. The *Tiller* case, supra, is contrary to the Utah decision and necessitates its reversal.

ARGUMENT

POINT I

THE SUPREME COURT OF UTAH IMPROPERLY HELD AS A MATTER OF LAW

THAT RESPONDENT WAS NOT NEGLIGENT IN OVEREXPOSING PETITIONER TO FREEZING WEATHER.

In determining whether the evidence presented a jury question on the issue of negligence "we must assume the most favorable statement of plaintiff's case to be true." See Mr. Justice Holmes per *Texas & Pacific R.Co., v. Behymer*, 189 U.S. 468, 23 S.Ct. 622, 47 L.Ed. 905 (1903). And ". . . the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury." See *Ellis v. Union Pacific R. Co.*, supra.

Factual Basis for Jury Finding of Negligence

The evidence was that when the crew first met at Green River, the foreman formed the opinion that Dennis was not dressed warmly enough for the anticipated night's work. However, he argumentatively testified that he had no responsibility with regard to supervision of the attire of his men. (R. 108.) The foreman thereafter proceeded with petitioner and the other members of the crew to the open joint sixteen miles from Green River and kept them at work throughout the night, subjecting them to temperature hovering near zero, on a windswept plain, without a single break for coffee, lunch, or rest over a period of twelve hours. Shortly after arriving at the open joint the foreman selected petitioner to walk a distance of three hundred yards in ten-inch snow at a time when he knew petitioner was the only member of the crew not wearing overshoes. At midnight, when the men were hovering near the fire, while a train was passing, petitioner notified the foreman that his fingers were

frozen to the wrench. Knowing that petitioner was in the process of suffering injury from overexposure, the foreman nevertheless failed and neglected to relieve him from his assignment in repairing the joint; on the contrary, he kept petitioner at work in the cold for an additional three and one-half hours. At the conclusion of the work, the foreman required petitioner to ride in the cold back end of the truck on the return trip to Green River.

In *Bailey v. Central Vermont R. Co.*, supra, this court stated:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort it required, the kind of footing he had, the space in which he could stand, the absence of the guardrail, the height of the bridge above the ground, *the fact that the car could have been opened or unloaded near the bridge on level ground* — all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent." (Italics ours.)

In view of the foregoing language of the *Bailey* case, it may not be amiss to consider additional safeguards that could have been taken to protect petitioner from injury.

1. At Green River, before the crew left for work, the foreman could have sent petitioner back for more clothing, in view of his belief that petitioner was inadequately clothed.

2. In view of the fact that petitioner was the only crew member not wearing overshoes, the foreman could

have sent another man the three hundred yards through the snow to get the truck.

3. At midnight, when the foreman was advised that petitioner's fingers were frozen to the wrench, he could have sent petitioner to a place of warmth and safety rather than keeping him at work in the cold for an additional three and one-half hours.

4. An additional crew could have been furnished either to work with petitioner's crew or to relieve it at the midway point. This would have eliminated for all practical purposes the danger of overexposure.

5. The task could have been postponed until morning by using the "dutchman" and flagmen. This would have eliminated for all practical purposes the danger of overexposure.

6. The crew could have worked a short evening shift and come back the next morning to finish the task.

7. The foreman could have taken the crew to Green River after having worked five or six hours and spent an hour warming and having coffee and then returned to finish the task.

In the face of the foregoing evidentiary basis for the jury's verdict, the Utah court has held that this is one of those:

> "... infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." See *Rogers v. Missouri Pacific R. Co.*, supra.

Inappropriate Resolution of Facts by Utah Supreme Court

The Utah Supreme Court has deprived petitioner of a jury trial by the inappropriate resolution of conflicting evidence. We cite a number of specific instances.

1. In its opinion the Utah Court states: (372 P.2d at p. 5.)

> "However, in searching for fault on the part of the railroad, it is significant to observe that there is no evidence that any one prevented or dissuaded the plantiff from warming his hands as often or as long as he wanted to";

And again: (P. 6)

> "He made similar candid admissions about being kept in the cold, admitting that he had access to the fire and to the truck to warm himself at any time he wanted to."

The Utah court fails to take into consideration the fact that *the foreman was in continuous supervision of the crew throughout the night, and the procedure adopted under his supervision was for the men to take turns at the fire.* The Utah court adopted as fact an inference that petitioner could have taken someone else's turn at the fire in addition to his own without objection from the foreman. The correct inference in petitioner's favor is that as a common laborer, working under the direction of a foreman, and knowing that they weren't going to quit until repair of the open joint was completed, petitioner would not feel that he had the pleasant alternative of being a slacker while his fellow workmen were laboring in the cold. There is no evidence that the foreman was such a generous fellow. In addition, petitioner, as a conscientious workman, would feel it his

duty to stay out and do his share of the work. That was expected of him and the thing for which he was paid.

2. The Utah court states: (p. 6)

> "With all sympathy for the plaintiff's misfortune, and every indulgence toward his claims, we are nevertheless unable to perceive any basis upon which the defendant can be held in violation of its duty to exercise reasonable care for his safety. Neither party can be blamed for the cold weather. Both were fully aware of it."

Petitioner has never undertaken to blame respondent for the cold weather. The basis for petitioner's claim, which the Utah court failed to perceive, is that respondent negligently exposed him to the cold weather for an unreasonable length of time. The repair of the open joint was not an emergency. The foreman could have delayed the work until morning. However, he chose to keep the crew at work until the repair had been completed. This brings into consideration the question of time. In view of the zero weather, the wind, and the darkness, what would be a reasonable cutoff time? Suppose this crew couldn't have finished the job in less than twenty hours. Would the Utah court hold as a matter of law that twenty hours of exposure was reasonable? Here petitioner was exposed to adverse weather conditions for twelve hours. A normal shift under ordinary conditions is eight hours. (R. 23.) Should a state appellate court decide what is a reasonable cutoff time as a matter of law, or should this matter be resolved by a jury in the spirit of liberality typified by the *Bailey* case, supra?

3. The Utah Supreme Court stated: (p. 7)

> "It must be appreciated that the railroad is in a business which literally moves on and must be kept moving."

And again: (p. 7)

> "In the face of difficulties such as here arose, it must resort to the best expedient available to meet these responsibilities and to keep its trains running on schedule."

Who should determine what is the "best expedient available"? As we have pointed out, the jury was not obliged to find it was necessary *or even particularly important* that "in order to keep the railroad moving," petitioner's crew be kept at work for twelve uninterrupted hours. As a matter of fact, the testimony was that by use of the "dutchman" trains could have been, as they were, kept moving regardless of whether the repair was made that night or the next morning. This is another example of an argumentative fact-finding appraisal of the evidence rather than a determination of whether there was an "evidentiary basis" for a finding in petitioner's favor.

4. The Utah court states: (p. 7)

> "They claim reasonable care required these measures: (1) That the defendant should have put more men on the job, which would have shortened the time for the repair and plaintiff's exposure to the cold; and (2) that the 'dutchman' (a short section of rail) could have been placed in the break and left until morning when the repair could have been done more quickly in daylight and when it was not quite so cold.
>
> In so far as the record reveals, these claims are fashioned of nothing more substantial than con-

> jecture and there is no reasonable basis to hold the railroad negligent on either count."

And again: (p. 7)

> "Nor is it shown that additional men would have shortened the time required for the repair."

The fact is, petitioner testified that an additional crew working at night could have repaired the open joint in four hours; that a single crew working in daylight could have performed the repair in four hours; and that with an additional crew working in daylight, they could have completed the work in two hours. (R. 44, 45.)

Petitioner's opinion was based on sixteen years' experience as a section hand. Furthermore, he is supported by the facts. The evidence was that in the early evening the four men paired off, each pair working simultaneously, step by step, away from the open joint. One man would hold the light and the other man work with the wrench. Later the crew started to work on one joint at a time. The truck driver would move the truck as the work progressed in order to help with the lighting. Also, the men were taking turns at the fire. An additional crew would have made it possible for the men to work throughout the night on two or more joints at a time. (R. 93.) Additional men would have been available to hold the lights, and the men would have been able to spend more time at the fire. (R. 34-37, 112-114.) If the work had been done in daylight, it wouldn't have been necessary for men to hold the lights; and with additional men available to work on the joints, the work time would have been shortened.

The Utah court, however, found as a fact that addi-

tional men wouldn't have shortened the work time *at all*, and that petitioner's claim to the contrary is based on "nothing more substantial than conjecture."

"5. In the *original* opinion the Utah Supreme Court stated: (See Appendix B, Pet. for Cert., p. 12.)

> "He said that at sometime during the night he complained of being cold, and the foreman told him to get in the truck."

And again: (p. 16)

> "It is undisputed that the only time he mentioned being cold the foreman suggested that he go to the truck for that purpose and he did so."

The foregoing statements were deleted from the corrected opinion, because petitioner had denied their truth under oath. (R. 64.) For the purpose of this brief, the foreman at no time suggested that petitioner get into the truck. *But it is interesting to note that when the decision was made to defeat petitioner, said misapprehension existed in the mind of the Utah court.*

At midnight when petitioner advised the foreman that his fingers were frozen to the wrench, the foreman should have done what the Utah court originally thought he did do. He should have suggested, or better still, insisted that petitioner go to the truck. The jury has so found.

6. In both of its opinions, the Utah court persists with the statement that the foreman and both other men testified that petitioner "went to the truck about midnight and remained there the rest of the night until the repair was completed about 4:00 a.m."

The foregoing statement is not supported by the record. The foreman testified petitioner was in the truck two hours. (R. 104.) Lee Carbjal testified petitioner was in the truck two hours. (R. 90.) James Burnett never did testify as to how long petitioner was in the truck. But the two hours supported by respondent's witnesses cannot be taken as true. Petitioner testified:

> "*Q. How long would you say you were in the truck?*
>
> "*A. Not over thirty minutes altogether, turning it around and altogether.*" (R.64)

Misconceptions of Law

In addition to its overriding misconception of the law concerning the right of trial by jury, the Utah court has made a number of erroneous statements as to the status of the law. We cite only a few.

1. In addressing itself to petitioner's evidence as to what more could have been done to protect the crew from overexposure the Utah court stated: (p. 7)

> "In so far as the record reveals, these claims are fashioned of nothing more substantial than conjecture and there is no reasonable basis to hold the railroad negligent on either count."

With regard to the conjecture argument this court stated in *Lavender v. Kurn*, supra:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them

to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.*" (Italics ours.)

2. The Utah court states: (p. 6.)

> "However extensive the railroad's duty to its employees for their safety has become, it has never extended to the supervision of the attire of its section hands."

The Utah court is incorrect in making the foregoing statement. The following cases impose the duty on railroads of exercising ordinary care in supervising the attire of employees: *Ferrara v. Boston & Maine Railroad*, 338 Mass. 323, 155 N.E.2d 416 (1959) (failure to furnish employee with helmet while welding). *Fitzpatrick v. St. Louis-San Francisco R. Co.*, Mo., 327 S.W.2d 801 (1959) (failure to furnish goggles; loss of eye because of dust). *Spears v. Atchison, T. & S.F. R. Co.*, 255 F.2d 780 (7th Cir. 1958) (failure to furnish rubber boots to protect feet from diesel and fuel oils). *Williams v. Atlantic Coast Line R. Co.*, 190 F.2d 744 (5th Cir. 1951) (failure to furnish lifesaving equipment where working on washout). *Young v. Clinchfield R. Co.*, 288 F.2d 499 (4th Cir. 1961) (failure to furnish respirator to employee working behind cribbing machine).

3. The Utah court apparently is of the opinion that if an additional crew was not available, the railroad is absolved from responsibility. The court states: (p. 7)

> "Other than the reference to its attempt to try to get the one more crew member who couldn't be located, there is no evidence that more men or crews were available."

This is a novel defense against the claim of insufficient help, but it has no legal support. The following cases support findings of negligence for failure to provide sufficient help, and hold that the duty of providing sufficient help is nondelegable. *They do not impose on an injured workman the duty of proving that other workmen were standing in the wings waiting to be called into the game.* See *Blair v. Baltimore & O. R. Co.*, supra; *Bourquet v. Atchison, T. & S.F. R. Co.*, 65 N.M. 207, 334 P.2d 1112 (1959); *Davis v. Virginian R. Co.*, supra; *Southern Railway Co. v. Welch*, 247 F.2d 340 (6th Cir. 1957); *St. Louis-San Francisco R. Co. v. King*, Okla., 368 P.2d 585 (1961).

4. Petitioner cited the *Rogers* case, supra, to the Utah court and was met with the following statement: (p. 6)

> "Plaintiff also urges application to our case of certain language from *Rogers v. Missouri Pacific Railroad Company:*
>
> "' . . . The test of a jury case is simply whether the proofs justify with reason the conclusion that the *employer negligence played any part, even the slightest*, in producing the injury . . .' (Emphasis added.)
>
> *"We do not understand the emphasized phrase, upon which plaintiff places great reliance in support of his position, as referring to the question whether negligence did or did not exist.* It will be noted that the statement proceeds upon the assumption that there is negligence and refers to the quantum thereof. It says in effect that if there is negligence, which played any part in causing the plaintiff's injury, even the slightest, the defendant is responsible for whatever pro-

> portion of the damages it caused. But it does not suggest any the less necessity for finding negligence, nor that 'even the slightest' fault might be found to be negligence." (Italics ours.)

The Utah court states that the liberal test pronounced in the *Rogers* case applies to the causation issue but not to the issue of negligence. A peremptory reading of the leading cases on the issue of negligence, as well as on the issue of proximate cause, demonstrates that there is no such nice distinction in quantum of proof between negligence and causation. See *Wilkerson v. McCarthy*, supra; *Lavender v. Kurn*, supra; *Tiller v. Atlantic Coast Line R. Co.*, supra; *Bailey v. Central Vermont R. Co.*, supra; *Tennant v. Peoria & P.U.R. Co.*, supra.

The *Rogers* case made no such distinction. The following language from the *Rogers* case indicates that the Utah court is again mistaken.

> "The Congress when adopting the law was particularly concerned that the issues *whether there was employer fault* and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence." (Italics ours.)

A BRIEF HISTORY OF THE FEDERAL EMPLOYERS' LIABILITY ACT IN UTAH

Over the years the Utah Supreme Court has authored a number of decisions under the Federal Employers' Liability Act which are at odds with controlling authorities of the United States Supreme Court. The decision here is painfully reminiscent of the past

and would seem to indicate the need for reaffirmance of well-established doctrine in this important class of cases.

In *Pauly v. McCarthy*, supra (1946), plaintiff had received a verdict under the Federal Employers' Liability Act for injuries sustained when he fell while alighting from a caboose at night. Defendant appealed. The Utah court reversed, holding as a matter of law that there was insufficient evidence for the jury. The Utah court held that an unlighted and unguarded walkway along a bridge on the passing track at Chacra, Colorado, was not a place to work, and that defendant had no duty to make it reasonably safe. It stated:

> "If the passing track at Chacra is a place to work, then every other passing track on the road is by the same token a place to work."

Just as in the case at bar, plaintiff had cited *Bailey v. Central Vermont R. Co.*, supra, as controlling authority. The Utah court attempted to distinguish the *Bailey* case by pointing out that the car involved in the *Bailey* case had been "spotted" on the bridge, and that the bridge was a "definite and assigned place to work." The Supreme Court of the United States reversed in a per curiam opinion, citing *Bailey v. Central Vermont R. Co.*, supra, and *Ellis v. Union Pacific R. Co.*, supra.

In *Wilkerson v. McCarthy*, supra (1947), plaintiff had brought an action under the Federal Employers' Liability Act for personal injuries sustained when he fell from a board across a wheel pit. He was an engine foreman and was moving from one place in the yard to another in the performance of his duties. The Utah court sustained dismissal of the case, holding that the board

across the pit was a place to work for the pit workers but not for other workers. This court unanimously reversed, remanded the case for a new trial, and pointed out that the basic error of the Utah court was its inappropriate resolution of disputed questions of fact. This court stated:

> "Thus the conflict as to continued use of the board as a walkway after erection of the chains was whether the pit workers alone continued to use it as a walkway, or whether employees generally so used it. While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict.
>
> *"It was only as a result of its inappropriate resolution of this conflicting evidence that the State Supreme Court affirmed the action of the trial court in directing the verdict."* (Italics ours.)

The strange claim of the Utah Supreme Court that the *Rogers* case requires one quantum of proof for negligence and another for proximate cause is reminiscent of the case of *Coray v. Southern Pacific Co.*, supra (1949), where the Utah court affirmed the trial court in granting a motion for nonsuit in a Federal Employers' Liability Act death case. Certiorari was granted by the United States Supreme Court and the case reversed.

In the *Coray* case a train had stopped suddenly as a result of defective brakes. Very shortly thereafter a track car had run into the rear of the train, causing the death of decedent. The Utah court held that the stopping of the train may have been a cause "in a philosophical sense" but not "in a legal sense."

The Supreme Court of the United States discussed niceties of language to defeat the right of trial by jury:

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose."

POINT II

THE SUPREME COURT OF UTAH IMPROPERLY HELD AS A MATTER OF LAW THAT PETITIONER'S NEGLIGENCE WITH RESPECT TO HIS CLOTHING AND/OR IN CARING FOR HIS OWN PERSON IN THE COLD WAS THE SOLE PROXIMATE CAUSE OF HIS INJURIES.

The Federal Employers' Liability Act is a comparative negligence statute. Contributory negligence is not a bar to recovery. See 45 U.S.C.A., Sec. 54. In the case at bar the jury expressly held that petitioner was fifty per cent to blame and reduced the verdict by $10,000.00. The Supreme Court of Utah was not content with the jury's verdict but held that petitioner was *solely* to blame for his misfortune. The court stated: (p. 7)

> ". . . it seems quite inescapable that it was the plaintiff's own conduct . . . that resulted in this regrettable injury."[1]

Thus it can be seen that the Utah court defeated peti-

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1. The Utah Supreme Court, in its original opinion, referred to plaintiff's "own neglect, or error of judgment" as the cause of his injury. In the corrected opinion the language was changed to plaintiff's "own conduct."

tioner by labeling as sole proximate cause an act which could at most have only been a contributing factor in bringing about petitioner's injury.

This court has denounced the device adopted by the Utah court in *Grand Trunk Western R. Co. v. Lindsay*, 233 U.S. 42, 34 S.Ct. 581, 58 L.Ed. 838 (1914), in the following language:

> "... and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his acts contributory negligence."

See also to the same effect *Tiller v. Atlantic Coast Line R. Co.*, supra; *Illinois Central R. Co. v. Skaggs*, 240 U.S. 66, 36 S.Ct. 249, 60 L.Ed. 528 (1916); *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 38 S.Ct. 318, 62 L.Ed. 751 (1918); *Spokane & Inland Empire R. Co. v. Campbell*, 241 U.S. 497, 36 S.Ct. 683, 60 L.Ed. 1125 (1916).

In determining as a matter of law that petitioner's conduct was the sole proximate cause of his injury, the Utah court entirely overlooked certain significant facts.

The foreman and petitioner were together in nighttime, windy zero weather for twelve hours. They were in a precisely equal position to observe conditions and to appreciate the danger from overexposure. The Utah court imposed sole responsibility on petitioner for not observing these conditions, leaving the work to his fellow crew members, and seeking out a comfortable and safe refuge. At the same time, the Utah court held

as a matter of law that the foreman in charge had no responsibility of observing conditions or taking measures for the safety of his men. No consideration was given to the fact that the foreman had absolute and unquestioned authority over his men and responsibility for their safety. By his own testimony the foreman observed that petitioner was not warmly enough dressed when the crew first met at Green River. (R. 101.) Nevertheless he took petitioner to an isolated section sixteen miles from home and worked him in zero temperature for a total of twelve hours without so much as a coffee break. He even selected him to go through the snow for three hundred yards to get the truck, knowing that petitioner was the only member of the crew who wasn't wearing overshoes. (R. 101.) *If this weren't enough, he kept petitioner working in the cold an additional three and one-half hours after being advised that petitioner's fingers were frozen to the wrench and thus having specific knowledge that petitioner was in the very process of being injured from overexposure.* Only if logic is subtracted from the reasoning process can a conclusion be arrived at that petitioner was negligent but that the foreman was free from blame. The complicated reasoning necessary to distinguish and give separate labels to the conduct of petitioner and that of the foreman runs counter to judicial history. This is not even the type of "close or doubtful" case mentioned in the *Bailey* case, supra.

POINT III

THE SUPREME COURT OF UTAH IMPROPERLY RESURRECTED THE DOC-

TRINE OF ASSUMPTION OF RISK AS A BAR TO PETITIONER'S RIGHT OF RECOVERY.

In 1939 Congress amended the Federal Employers' Liability Act by eliminating assumption of risk as a defense. See 45 U.S.C.A., Sec. 54. See Appendix A. The leading case interpreting the aforesaid amendment is *Tiller v. Atlantic Coast Line R. Co.*, supra. In the *Tiller* case this court stated:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' "

And again:

> "The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudesence under any other label in the common law lexicon."

We find in the case at bar another attempt to resurrect the doctrine of assumed risk by giving it a different label. The Utah court states: (p. 6, 7)

> "Neither party can be blamed for the cold weather. Both were fully aware of it . . . The plaintiff himself was in the best position to know about the sufficiency of his clothing . . . plaintiff alone could know how cold he was; that he could best judge what to do about it and communicate the fact to others . . . it seems quite inescapable

> that it was the plaintiff's own conduct with respect to his clothing and/or in caring for his own person in the cold, that resulted in this regrettable injury."

As can readily be seen from the foregoing language, the Utah court is saying, in effect, that the railroad can't be blamed for cold weather, and that consequently any risk of injury from overexposure is assumed by petitioner. Likewise, the railroad can't be blamed for the manner in which petitioner dresses and any risk of injury from inadequate attire is assumed by petitioner. Thus the duty of the railroad to exercise ordinary care in supervision of its employees and in protecting them against unreasonable risk of harm is negated. The workman is given full and exclusive responsibility to look out for himself and, we assume, resign from his employment if necessary[1] in order to protect himself from exposure to the risk of harm.

In *Gulf, Colorado & S.F.R. Co. v. Waterhouse*, Tex. Civ. App., 223 S.W.2d 654 (1949), the appellate court sustained a finding that a foreman was negligent in ordering plaintiff to work after plaintiff complained to him of the effects of heat. Defendant had argued that the foreman was not negligent, *because plaintiff was himself the best judge of his own strength, and that it could be assumed that plaintiff would avoid becoming overheated.* The court stated at page 661:

> ". . . but they bring to mind applications of the defense of assumed risk and suggest further that plaintiff's return to work and his performing work amounted to negligence on his own part and that this negligence was the sole cause of his

1. The Utah court stated at 372 P.2d, p. 6, "If nothing else, the plaintiff could have 'stood in bed.' "

injury. The Federal Employer's Liability Act applies to this case, as plaintiff has pointed out, and thus the defense of assumed risk, including the extensions of this defense referred to in Tiller v. Atlantic Coast Line R. Co., is not available to defendant."

Of particular application to this issue is the language of *Williams v. Atlantic Coast Line R. Co.*, supra, where the court stated:

> "Indeed, even though the employee may know that the employer has been negligent in the furnishing of a safe place to work or necessary safety equipment, the employee does not under this act assume the risks of such danger."

CONCLUSION

The special and important reasons for granting certiorari in this class of cases have been recognized in the case at bar. Petitioner has been granted the right to determination of his case on the merits. It is respectfully submitted that the proofs justify with reason the conclusion that employer negligence played a part in producing his injury. The decision of the Utah Supreme Court should be reversed and the verdict reinstated.

Respectfully submitted.

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APPENDIX A

PERTINENT PARTS OF FEDERAL EMPLOYERS' LIABILITY ACT

45 U.S.C.A., Sec. 51:

LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE: DEFINITION OF EMPLOYEES

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties

as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

45 U.S.C.A., Sec. 53:

CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, §3, 35 Stat. 66.

45 U.S.C.A., Sec. 54:

ASSUMPTION OF RISKS OF EMPLOYMENT

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, §4, 35 Stat. 66; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 25

CLAUDE DENNIS, *Petitioner*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*.

BRIEF OF RESPONDENT

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On Writ of Certiorari to the Supreme Court of Utah

Petition for Certiorari Filed October 18, 1962
Certiorari Granted January 7, 1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 535

CLAUDE DENNIS, *Petitioner*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*.

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. There is, however, some inaccuracy and omission which requires a brief statement by respondent.

Petitioner, a section hand of 16 years experience, was a member of a crew called to work to repair an open joint (separation of the rails) on defendant's main line. Petitioner did not consider the repair to be of an emergency character (R. 44, 45). The officials of the railroad company considered the open joint to require an immediate emer-

gency repair operation to permanently secure the open rails (R. 127). Respondent's concern for delay in the work was threat of derailment and interference with train schedules pending final repair (R. 127-129).

All available sectionmen in the area were called to assist in the repair. The four-man crew which petitioner was working with on the night in question was as large a crew as ever employed in the closing of an open joint (R. 130-131).

Petitioner testified that when he was called to work about 5:00 o'clock p.m., it was "awful cold" and that "the wind was blowing pretty hard" (R. 25). It was not uncommon for petitioner to be called to work on such assignments (R. 69. See Exhibit 1-D, R. 52, 138-142). He knew that he would be exposed to the weather and provided clothing which he considered adequate to protect him. In this regard he testified: (R. 69)

> "Q . . . You sectionmen accept the responsibility of clothing yourself for the kind of weather you are exposed to on the particular railroad job?
>
> A. We furnish our own clothes, yes."

(R. 56)

> "Q. And that is the custom and the practice on the railroad for sectionmen to furnish all of their own clothing?
>
> A. Yes.
>
> Q. So you yourself provide yourself with what you think is sufficient to protect you against the cold?
>
> A. Yes, sir."

Petitioner was the only member of the crew who wore canvas gloves in lieu of woolen mittens and who failed to wear overshoes (R. 55). He was the only one who suffered frostbite.

In light most favorable to petitioner the evidence shows that the crew was called to work about 5:00 p.m., arrived at the repair site about 5:45 p.m. and left for Green River about 4:00 a.m. the following morning, arriving about 5:00 a.m., indicating working time at the repair site of approximately 10 hours (R. 37, 63). Petitioner spent part of the time at the repair site in the heated cab of the truck. [Petitioner said that he was in the truck not to exceed 30 minutes (R. 64), and his three fellow workmen testified that he was in the cab from midnight until the job was completed (R. 90, 95, 104).]

Fires were built at the repair site to enable the crew to warm themselves if they became cold. With respect to this petitioner testified: (R. 68)

> "Q. Now there was no one who of course prevented you from going and warming yourself by this fire at any time you wanted, was there, Mr. Dennis?
>
> A. We generally took turns at it.
>
> Q. You could go over there if you got cold and go by the fire if you wanted, could you not?
>
> A. For what good you could get out of it, yes.
>
> Q. *And of course no one knew better than you when you were cold enough and wanted to go over to the fire?*
>
> A. *That's right.*"

The foreman testified that whenever the men felt too cold, they went to the fire (R. 113). When trains passed, the crew went to the fire together (R. 68).

There is no evidence whatever that petitioner made any request for clothing; that he asked for permission to obtain additional clothing himself, or that he made any request to warm himself by the fire or in the cab of the truck which was not granted.

Petitioner testified that the crew went over to the fire together about midnight. He said, "I laid the wrench down there and when I did these two fingers were clamped shut and I had to pull them apart like that before I could get my glove off" (R. 35-36). At that time petitioner commented, "It looks like my hand's frozen to that wrench" (R. 36). Petitioner said that about midnight he felt a "burning, tingling sensation" in his fingers (R. 36). He did not report this to the foreman or his fellow workers. The foreman testified that petitioner complained of the cold around midnight and that he was told to get into the cab of the truck (R. 104). Petitioner denied that he got into the truck at midnight, but he did not refute the testimony of the foreman that he was told to do so.

In a written statement given by petitioner following the accident, he stated that, "It was not unusual for us to be called out for this kind of work in cold weather. . . . Many times we worked overtime for longer periods of time than this one, and also were called for such work in even colder weather than this time, but previously I never had any trouble resulting from the cold weather. . . . The only thing I can blame this freezing of my fingers on was the weather." (Exhibit 1-D, R. 52, 138-142).

The expert witness called by petitioner testified that when a person's body temperature is reduced, he is more subject to frostbite and that the preventive for frostbite is the correct type and sufficient amount of clothing (R. 75-76).

Petitioner's injury consisted of the loss of one finger and part of another on his left hand. The jury assessed his damages at $20,000.00 and diminished the award by one-half for contributory negligence (R. 12).

The trial court denied respondent's motions for directed verdict and for judgment n.o.v. (R. 11, 13, 14, 133). The Utah Supreme Court reversed.

SUMMARY OF ARGUMENT

The decision of the Utah Supreme Court is in accordance with the evidence and the law.

I.

The respondent was not negligent. Railroads are not charged with injuries resulting from the "usual risks" of employment which cannot be eliminated through the exercise of reasonable care. Exposure to weather is such a risk. Neither prevailing custom nor case law requires respondent to clothe petitioner against the weather.

The petitioner was not unnecessarily or unreasonably exposed to the cold weather. The rails were separated on respondent's main line, and repair operations had to be undertaken before any traffic could travel over the line. Permanent repair operations were essential before rail traffic could move with safety and in accordance with published time schedules. All available help was provided in performing the emergency repair work.

Respondent's foreman acted in accordance with the requirements of due care. Fires were built at the repair site to provide warmth against the cold. Employees were permitted to go to the fire when they felt the need of it. Breaks were taken when trains arrived at the repair site, and in addition the sectionmen took regular turns at the fire. Petitioner made only one complaint about the cold, at which time he was told to get into the heated cab of a truck. The foreman's action in supervising the work was in accordance with the requirements of the occasion in accomplishing the repair work as soon as possible with as much help as was available and with ample protection afforded for the workmen.

II.

Petitioner's own conduct (negligent or otherwise) was the sole cause of the accident. Petitioner knew his own need for clothing and for the warmth of the fire. He failed to provide adequate clothing. His exposure to the cold was a matter entirely within his own control. He had apparent notice of his own peril when he felt a tingling and burning sensation in his fingers, but he failed to report this condition to the foreman and continued his work to the end of the shift without complaint.

III.

The Utah Supreme Court did not revive the doctrine of assumed risk. Nothing in the opinion of the Court even remotely suggests that petitioner's recovery is barred by reason of his assumption of any risk presented by negligence of the respondent.

ARGUMENT

POINT I.

THE SUPREME COURT OF UTAH DID NOT ERR IN HOLDING THAT THERE WAS NO EVIDENCE OF EMPLOYER NEGLIGENCE.

(1) The cases do not charge railroads for injury caused by exposure to weather in the absence of specific proof of negligence.

In his statement given to the railroad company petitioner explains the cause of the accident as follows: (Exhibit 1-D, R. 52, 141)

> "The only thing I can blame this freezing of my fingers on was the weather."

Petitioner's statement calls to mind the statement of Mr. Justice Frankfurter in *Tiller v. Atlantic Coast Line Railroad Company*, 318 U.S. 54, 63 Sup. Ct. 444, wherein it is said:

> "The carrier is not . . . to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care."

The decisions of this Court still require an evidentiary basis for a finding of employer negligence. *Herdman v. Penn. R. R. Co.*, 352 U.S. 518, 77 Sup. Ct. 455 (1957); *Brady v. Southern R. Co.*, 320 U.S. 476, 645 Sup. Ct. 233 (1943); *Eckenrode v. Penn R. Co.*, 335 U.S. 329, 69 Sup. Ct. 91 (1948).

Counsel for petitioner have cited two cases dealing with railroad liability for exposure to weather. *Anderson v. Atchison T. & S. F. R. Co.*, 333 U.S. 821, 68 Sup. Ct. 854, and *Hayes v. New York Central R. Co.*, 311 F.2d 198. The evidence in the *Anderson* case disclosed that the railroad employee, a train conductor, fell from a train and injured himself. In his helpless condition he was exposed to bitter cold weather over a period of several hours which resulted in his death. The negligence on which liability was predicated was the failure of the train employees to make any effort of any kind to save him from his position of helpless peril. The case has on bearing on the facts of the instant case. In the *Hayes* case a temporary employee suffered frostbite while shoveling snow for a period of 27 hours. The evidence disclosed, to the satisfaction of the trial judge and the reviewing court, that the railroad assured the employee that he could safely embark upon his work without protection for his feet against the snow and weather conditions and effectively *prevented* the employee from securing a pair of boots before he commenced his work. The negligence in the *Hayes* case was predicated on the conduct

of the railroad in actually preventing the employee from taking action to adequately clothe himself and in assuring him that his existing clothing was sufficient.

As can be readily seen, neither of the above cases is precedent for a holding that employer negligence may be predicated solely on proof of exposure to weather in the course of railroad work.

As will be shown, the evidence in the case at bar demonstrates that petitioner is an experienced sectionman. His exposure to the weather was in the course of ordinary, usual and necessary railroad work. The railroad exercised no control over petitioner's clothing. He retained full control over his own attire. Fires were provided for petitioner's use at will. Assuming that petitioner took proper care to clothe himself adequately and to avail himself of opportunity for warmth, it follows that climatic conditions constituted the sole cause of petitioner's injury. We think that the opinion of the Fifth Circuit properly stated the law in *Fort Worth & Denver R. Co. v. Smith*, 206 F.2d 667, where it was said: (206 F.2d 669)

> "It is a general rule that a railway company is not liable to its employees for injuries resulting from climatic conditions. . . ."

(2) Respondent has no duty to provide clothing to its employees to guard them against weather conditions.

Petitioner's injury resulted from a combination of cold weather, inadequate clothing and exposure. Respondent has no influence over weather conditions. Exposure to heat and cold is therefore a necessary part of railroad operations.

No technical knowledge or special equipment is required in clothing one's self to protect against the weather.

In the case at bar the petitioner is a railroad man of 16 years' experience. These 16 years of experience involve work in the same area and of the same character as was being performed on the night of the injury. Petitioner's own testimony shows recognition that he is best able to determine his own needs.

Petitioner's counsel have cited cases requiring railroads to exercise reasonable care to provide special safety equipment such as goggles and respirators where the circumstances of a particular type of work give rise to a special hazard (Page 24, Petitioner's Brief). Such cases are not in point here. We find no cases requiring the employer to provide protective clothing against the usual and ordinary risk presented by exposure to weather, and it has been held that protective clothing need not be furnished to railroad employees in the performance of usual and ordinary tasks not involving special risks created by the employer. *Wolfe v. Henwood*, 162 F.2d 998 (8th Cir. 1947).

In the case at bar neither party assumed that the railroad had any duty (or right) with respect to the supervision of petitioner's attire. In line with the prevailing custom and practice, petitioner assumed the right and the responsibility for clothing himself. He did not rely on the respondent. The evidence furnishes no basis for a conclusion that the railroad had a duty to clothe petitioner against the weather.

(3) The respondent was not negligent in proceeding with immediate repair of the open rails or in failing to provide sufficient help to accomplish the work.

Exposure to weather is a necessary incident of railroading. Railroads are operated and must be maintained under all weather conditions. Maintenance and repair problems arise night and day, winter and summer.

The open joint reported on January 2, 1962, was not an unusual or an extraordinary occurrence. In his statement petitioner said, "It was not unusual for us to be called out for this kind of work in cold weather and I had been called out for just such work lots of times" (Exhibit 1-D, R. 52, 139). The open joint did require immediate attention. At least temporary repair had to be made before any traffic could pass. A train was waiting when petitioner's crew arrived at the scene.

Petitioner's counsel contend that petitioner was unnecessarily and unreasonably exposed to risk of frostbite by the railroad's decision to proceed with immediate nighttime repair of the open rails. It is the apparent position of counsel for petitioner that in the exercise of due care the railroad was required to defer the repair operation until the next day, notwithstanding the fact (admitted by petitioner himself) that six trains would pass over the open joint during the nighttime (R. 45) carrying passengers and property between Denver and Salt Lake City. Respondent submits that this position is wholly untenable.

The use of dutchman, while adequate as a temporary measure to allow passage of trains at reduced speed during repair operations, does not eliminate the danger to life and property attendant an unsecured rail. The tendency of the opening between adjoining rails to increase and the possibility of the loose dutchman turning out of alignment (R. 127-129) present ample warrant for the policy of the railroad industry to repair an open joint as soon as possible. Under the circumstances, had an accident occurred by reason of delay in the closure of the joint, respondent would almost certainly have been found negligent. Further, the delay in repair would have a serious effect upon the ability of the railroad to meet its published time schedules. This fact is not is dispute.

Assume that there is an honest difference of opinion between petitioner (a switchman) and the railroad as to the importance of immediate repair in the interest of public safety and convenience. There is nothing whatever in the record to warrant an inference that the railroad did not act in good faith or in line with what is considered to be its duty. Under these circumstances, it is submitted that petitioner's judgment as to the proper policy to be followed by railroad management should not be the basis of a standard. Petitioner's testimony that the repair could have waited furnishes no basis for charging the railroad with negligence in proceeding with the repair work.

Nor is there merit in the contention that adequate help was not furnished. It is true that there were two section crews in the remote area of respondent's line near Green River. Two open joints were reported on the same night, however, and a crew was dispatched to close each joint (R. 121, 122). Petitioner sought to prove availability of an additional railroad worker, one Delmar Powell. The evidence is that Powell was called by the foreman but could not be contacted (R. 101, 112). Furthermore, the undisputed evidence is that the four-man crew who worked on the joint in this instance was as large a crew as ever required or employed to reduce an open joint and that in isolated areas it was common to do such work with two or three men (R. 130, 131).

Counsel for petitioner cite five cases in support of their contention that the State Supreme Court erred in rejecting the plea of insufficient help (Page 25, Petitioner's Brief). *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600, 65 Sup. Ct. 545; *Bourquet v. Atchison T. & S. F. R. Co.*, 65 N.M. 207, 334 P.2d 112; *Davis v. Virginian R. Co.*, 361 U.S. 354, 80 Sup. Ct. 387; *Southern Railway Company v. Welch*, 247 F.2d 340; *St. Louis-San Francisco R. Co. v. King*, 368 P.2d 835. None of these cases are in point.

In the *Blair* case the plaintiff was moving a 1,000 pound steel tube assisted by two men, 60 and 68 years of age, each of which was unfamiliar with the work. Plaintiff suggested that the movement be made with equipment, but the foreman rejected the suggestion and told plaintiff to proceed. In *Bourquet* the plaintiff was doing work customarily assigned to two men. *Davis* dealt with the question of inexperienced help. In the *Welch* case plaintiff was performing work in moving rails without assistance customarily furnished to him. *King* involved an injury sustained by an employee engaged in moving a heavy metal bar without assistance which he had previously requested from the railroad company.

There is no evidence or claim that the crew was insufficient in number or experience to enable it to safely perform the work of closing the open joint.

With the report of an open joint on its main line and the knowledge that six high-speed trains would be required to pass during the night, respondent was confronted with an emergency situation. Assuming, arguendo, that the need for more help had been shown, the evidence is that all available help was employed to do the work. None of the cases cited by petitioner charge a railroad company with negligence in failing to provide unavailable help in an emergency situation. Though the duty to provide sufficient help is primary, nondelegable and continuous, it is still a "duty to exercise reasonable care." *Patton v. Texas & P. R. Co.*, 179 U.S. 658, 21 Sup. Ct. 275; *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 63 Sup Ct. 1062; *August v. Texas & N. O. R. Co.*, 265 S.W.2d 148. The employer is bound to exercise "reasonable care" and make "reasonable effort" (commensurate with the danger) to furnish sufficient men to do the job. The railroad company is not a guarantor or an insurer in this area. (See cases cited, supra.) In light of this test,

what could and should the railroad have done? All available sectionmen in the area were put to work. What more can be reasonably required?

But, even assuming that additional help was necessary in order to hasten the repair and that petitioner was negligent in failing to provide the same, there still remains the question as to whether or not the lack of additional help was a proximate cause of petitioner's frostbite. We find no evidence to warrant a finding in favor of petitioner on this issue.

(4) Respondent's foreman was not negligent in his supervision of the crew and direction of the work.

Petitioner is an adult with 16 years' experience as a sectionman (R. 21, 44). He has worked on the same section for all of his 16 years' experience and has lived in Green River virtually all of that time (R. 22). In closing the open joint he was doing the same work which he had done on many prior occasions (R. 44). In the words of petitioner's statement, it was "nothing for me to go working in extremely cold weather with my gang under Foreman J. G. Chronopoulos. . . . Many times we worked overtime for longer periods of time than this one, and . . . we were called for such work in even colder weather than this time. . . . I knew we might be gone for many hours . . ." (Ex. 1-D, R. 52, 139. See also R. 72.)

The section foreman, J. G. Chronopoulos, had worked with petitioner at Green River during all of the time that petitioner had worked there (R. 98).

At the time he sustained his injury petitioner was dressed the same as he had been on prior occasions (R. 73, 109). The foreman testified that in his opinion, petitioner never did dress warm enough for the cold weather (R. 109).

The foreman felt this way about petitioner's attire on the night of January 2 (R. 108) and he testified that he told petitioner when petitioner reported for work that "he ought to have more clothes on" (R. 108). Petitioner denied that the foreman made any such comment to him (R. 55). Petitioner clothed himself with what he considered to be adequate in light of his 16 years' experience. Both petitioner (R. 56, 69) and the foreman (R. 108) considered the responsibility of providing adequate clothing for petitioner's individual needs to be with petitioner.

Counsel for petitioner argue dramatically about the conduct of the foreman in requiring the crew to work "throughout the night" under temperatures "hovering near zero" on a "windswept" plain "without a single break" (Page 15, Petitioner's Brief). It is true that the crew worked an overtime shift on a cold January night to repair an open joint. There was no evidence that this was an extraordinary or unnecessary occurrence. On the contrary, this was the very job for which these men were paid. This is the very type of work which their employment contemplated. Contrary to counsel's representation of the evidence, the work was not performed "without a single break." Petitioner's own testimony establishes that travel time to and from the repair site consumed about 1¾ hours (R. 37, 63); that he spent about a half hour in the truck at the repair site (R. 64); that three breaks were taken during the actual work shift when the men warmed themselves by the fire while trains passed (R. 35, 68), and that in addition the men took breaks in turn to warm themselves by the fire (R. 68).

Also contrary to fact is counsel's statement that the foreman knew that petitioner "was in the process of suffering injury from overexposure" (Page 16, Petitioner's Brief). There is no such evidence in the record. The state-

ment that a hand (glove) is frozen to a wrench does not carry with it notice that frostbite has or is occurring. The significant fact is that petitioner at the time he made such statement probably had notice of the danger of frostbite by the "burning, tingling sensation" he felt (R. 36), *but he did not communicate this information to the foreman.* Instead, according to his testimony, petitioner continued to work without complaint or suggestion for relief or care. The evidence does not show that the foreman had knowledge or notice of petitioner's peril. *The record does show that petitioner (who was in the best position to know) had notice of the peril, but said nothing about it, and according to his testimony, continued to work another four hours without complaint.*

Petitioner's counsel have made a list of so-called "safeguards" apparently conceived by them after hours of serious reflection in the preparation of this lawsuit (Page 16, Petitioner's Brief). It is urged that the foreman, having failed to conceive of or observe these "safeguards," was, as a consequence, guilty of negligence. As the railroad views it, the circumstances did not require any of the steps suggested by petitioner's counsel.

The suggestion that petitioner should have been sent home for more clothing fails to consider the fact that the railroad had no duty to clothe the petitioner or to presume the right to insist that he be clothed in accordance with a particular foreman's views. This argument also fails to consider the fact that petitioner and the foreman had been working together for 16 years and (notwithstanding the foreman's doubts) petitioner's clothing had, on prior occasions, always been sufficient for his needs.

By the contention that petitioner should not have been sent 300 yards to get the truck, it is implied that the walk to the truck and return in the heated cab in some way con-

tributed to petitioner's frostbite. There is no such evidence in the record, nor is such an inference warranted from any evidence offered or received. On the contrary, the walk to the truck and the interval in the cab would probably provide more stimulation and protection than holding a light or pushing on a steel bar in the course of closing the joint.

Nor is there any basis for the argument that petitioner should have been sent to a place of "warmth and safety" at midnight. The comment about the hand and wrench was not such as to give notice to respondent of the peril of frostbite. As already pointed out, petitioner may have had such notice but he failed to communicate it to the foreman. Petitioner made no complaint. Furthermore, the foreman testified that he *did* tell petitioner about midnight to get into the cab of the truck, and petitioner has not denied this (though he denies that he actually got into the truck).

The suggestion that another crew should have been called has already been discussed.

For reasons previously stated, postponement of the final repair operation would have been contrary to the public safety and convenience in the operation of the railroad.

Counsel's final "safeguard," i.e. that the crew should have been taken to Green River for a break is neither reasonable nor practical. The travel to and from Green River and time consumed during the break would have prolonged the work shift another 2 to 3 hours, and petitioner would have spent an additional two hours in the back of the truck thereby increasing the actual time of his exposure to the weather.

It is respectfully submitted that there is no evidence of negligence on the part of the foreman.

POINT II.

PETITIONER'S CONDUCT WAS THE SOLE CAUSE OF HIS INJURY.

Petitioner takes exception to the comment of the State Supreme Court "that it was the plaintiff's own conduct . . . that resulted in this regrettable injury." To show error in the State Court's comment that petitioner's conduct was the "sole cause," petitioner's counsel have quoted a part of a paragraph from the case of *Grand Trunk Western Railroad Company v. Lindsey*, 233 U.S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838 (1914), and in doing so have omitted a significant part of the opinion immediately following that quoted, which reads:

> "It is only when plaintiff's act is the sole cause — when defendant's act is no part of the causation — that defendant is free from liability under the act."

If petitioner's conduct was the "sole" cause, respondent is not liable even had it been negligent. This is just another way of saying that defendant must be shown responsible for a negligent act or omission which was a proximate cause of the injury.

In view of the State Supreme Court's determination that there was no evidence of employer negligence, it was unnecessary to the decision on appeal to evaluate petitioner's conduct. But the State Court comment that "plaintiff's own conduct" was the cause of injury is irrefutably supported by the evidence.

Petitioner's counsel urge that the foreman and petitioner "were in a precisely equal position to observe conditions and to appreciate the danger from overexposure" (Page 30, Petitioner's Brief). This statement is incorrect. Petitioner himself testified that he was in the best position to know his own need for clothing and that he alone knew

when he was cold enough to require the warmth of the fire (R. 68, 69). His testimony in this regard is just common sense. But, petitioner failed to provide sufficient clothing, and the extent of his exposure to the cold was a matter entirely within his control. He was not required to remain exposed to the cold any longer than he chose. There was no evidence that he had instructions or felt any moral compulsion to "take turns" at the fire. The foreman said that the men went to the fire when they got cold (R. 113), and petitioner testified that he was free to go to the fire whenever he wanted and that he was the best judge of his own need for the warmth of the fire (R. 68). Reason does not require the railroad company to advise the petitioner when he has become "too cold" and when he should seek shelter and warmth.

Lastly, *petitioner had apparent notice of his own peril about midnight when he felt a tingling and burning sensation in his fingers* (R. 109, 110). *Notwithstanding this, he failed to report this condition to the foreman and, according to his testimony, voluntarily continued his work to the end of the work shift.* The evidence is compelling that petitioner's own conduct (negligent or otherwise) was the cause of his injury.

POINT III.

THE SUPREME COURT OF UTAH DID NOT REVIVE THE DOCTRINE OF ASSUMED RISK.

Counsel for petitioner argue that the Utah Supreme Court has resurrected the doctrine of assumed risk. Their contention is founded upon statements in the State Court opinion that "neither party can be blamed for the cold weather" and that "plaintiff himself was in the best position to know about the sufficiency of his clothing." From these statements counsel infer that the Utah Court has held that

"any risk of injury from overexposure is assumed by petitioner" and that "any risk of injury from inadequate attire is assumed by petitioner" (Pages 32 and 33, Petitioner's Brief). There is a big gap between the language of the State Court opinion and the twisted construction placed thereon by petitioner's counsel.

In commenting that neither party can be "blamed for the cold weather," the State Court properly concluded that employer fault or negligence could not be predicated upon weather conditions. The further statement that petitioner "was in the best position to know about the sufficiency of his clothing" is a comment on his own conduct as it bears upon the accident. There is not the slightest suggestion that petitioner's recovery is barred because he is held to have assumed any risk presented by negligence on the part of respondent.

The basis of the opinion of the Utah Supreme Court is set forth as follows: (372 P.2d 3, 7)

> "Notwithstanding the broad prerogatives of the jury in this case in determining the standard of reasonable care, where it appears that the railroad acted in good faith and exercised its judgment as to the proper course to follow; and there is no evidence of failure to use reasonable care in doing so, the jury cannot be allowed to second guess the judgment of management and impose liability upon the railroad simply because a mishap such as the one of concern here occurred."

Respondent respectfully submits that the foregoing analysis is sound and fair and in line with the principles laid down by the United States Supreme Court.

CONCLUSION

The opinion of the Supreme Court of Utah reflects a conscientious effort to canvass the facts in light of the decisions of the United States Supreme Court. The conclusion that there is no evidentiary basis for a finding of employer negligence finds support in the record before this Court. The decision of the Utah Supreme Court should be affirmed.

Respectfully submitted,

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